

# **Disadvantaged Business Enterprise Program: Participation Plan**

Revised February 2000  
In Response to 49 CFR 26 et. seq.



**Washington State Department of Transportation**  
Office of Equal Opportunity

Persons with disabilities may request this information  
be prepared and supplied in alternate forms  
by calling collect (206) 664-9009;  
Olympia area 705-6980 (TDD or V),  
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## **Executive Order**

Number: E 1009.00



Secretary of Transportation

Date: July 26, 1999

### **Disadvantaged Business Enterprises**

#### **Program Established**

This Executive Order is issued to assist Washington State Department of Transportation (WSDOT) employees with implementing the Disadvantaged Business Enterprise (DBE) Program.

#### **Federal Financial Assistance**

As a condition of receiving federal financial assistance from the United States Department of Transportation (USDOT), the department gave written assurance to USDOT that it will comply with the regulations of 49 Code of Federal Regulations (CFR), Part 26.

#### **Policy of the Department**

We establish the following department policy with this Executive Order:

**Policy Number P 2005.00, Disadvantaged Business Enterprises Program:** It is the policy of WSDOT to comply with 49 Code of Federal Regulations , Part 26, to ensure Disadvantaged Business Enterprises have an equal opportunity to receive and participate in WSDOT assisted contracts.

#### **Objectives of the Program**

The primary objectives of the Disadvantaged Business Enterprises Program are to:

1. Ensure nondiscrimination in the award and administration of federally-assisted contracts.

2. Create a level playing field on which DBEs can compete fairly for federally assisted contracts.
3. Ensure that the DBE Program complies with applicable laws.
4. Ensure that a firm meets 49 CFR Part 26 eligibility standards before being permitted to participate in the DBE Program.
5. Help remove barriers to DBE participation in WSDOT assisted contracts.
6. Assist the development of firms so that they may compete successfully in the market place outside of the DBE Program.

### **Office of Equal Opportunity Role and Responsibilities**

The Director of the Office of Equal Opportunity is the department's DBE Liaison Officer. The DBE Liaison Officer is responsible for implementing all aspects of the DBE Program. This effort has the same priority as compliance with all other legal obligations incurred by WSDOT in its financial assistance agreements with the USDOT.

### **Distribution**

This Executive Order and Policy Statement will be sent to the standard department statewide distribution list. This includes the Transportation Commission, the Executive Board, and all organizations within the department. It will also be distributed to both DBE and non-DBE businesses through the DBE Plan Book distribution, DBE Program training workshops, DBE Support Services Program, and elsewhere to ensure the widest possible distribution.

***Alternate Formats:*** Persons with disabilities may request this information be prepared and supplied in alternate forms by calling collect (360) 664-9009. Deaf and hearing impaired people call 1-800-838-6388 or 705-6980 for Olympia residents. (TTY relay service).





**Washington State Department of Transportation**  
**Disadvantaged Business Enterprise Program**  
**49 Code of Federal Regulations Part 26**  
**Participation by Disadvantaged Business Enterprises in the**  
**Department of Transportation Financial Assistance Programs**

**I. Purpose**

The purpose of the Disadvantaged Business Enterprise (DBE) Program is to provide equal opportunity to minorities and women in contracting. The Washington State Department of Transportation (WSDOT) has developed guidelines and procedures to ensure that DBEs have an equitable opportunity to compete for contracts, subcontracts, and agreements.

WSDOT endeavors to provide assurances to the U.S. Department of Transportation (USDOT) that WSDOT and its subrecipients of federal financial assistance will comply with federal mandates regarding the DBE Program.

**A. Scope**

This program applies to USDOT federal financial assistance where WSDOT and its subrecipients expend federal aid funds authorized by Title I, III, V, and VI of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the 1998 Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107, Federal Transit Laws in Titles 49 U.S.C., and 49 U.S.C. 47101, et seq.

The DBE Program also applies to federally-funded non-construction programs. Efforts will be made to provide a level playing field for DBE participation in USDOT funded construction, procurement, and consultant contracts. Contract administrators will solicit DBE participation in all contracts that lend themselves to such participation.

**B. Authority and Applicable Laws**

The USDOT Regulations (49 CFR Part 26) published in the Federal Register, Volume 64 No. 21, dated February 2, 1999, established a requirement that all recipients of USDOT program funds establish a DBE Program. The regulations are applicable both to WSDOT's federal aid construction and to its nonconstruction activities.

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, national origin, and sex in the provision of benefits and services resulting from federally assisted programs and activities.

The program is also subject to the following authorities, 23 U.S.C. 324; 42 U.S.C. 200d et seq.; 49 U.S.C. 1615, 47107, 47113, 47123; Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

All manuals, policy statements, and directives used or relied upon by WSDOT or any of its subrecipients or agents to implement the DBE program shall be deemed to be revised to correspond to the provisions of this DBE Plan. In the event of any conflict between the DBE Plan or any of its provisions, with any manual, policy statement, or directive relied upon by WSDOT or any of its subrecipients or agents in the implementation of the DBE program, the DBE Plan as approved, including any approved later revisions, shall prevail.

Where there is a conflict, federal law prevails over state law.

## **II. Applicable Recipients**

Pursuant to 49 CFR Part 26.3, this plan applies to recipients of the following types of funds:

- A. Federal Aid Highway Funds authorized under Titles I (other than Part B) and V-B of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.
- B. Federal Transit Funds authorized by Title I, III, V and VI of ISTEA, Pub. L. 102-240 or by federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of TEA-21, Pub. L. 105-178.
- C. Airport Funds authorized by 49 U.S.C. 47101, et seq.



### III. Definitions

The following definitions are referenced in 49 CFR Part 26.5:

- A. **Affiliation** has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR Part 121.
  - 1. Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either directly or indirectly:
    - a. One concern controls or has the power to control the other, or
    - b. A third party or parties controls or has the power to control both, or
    - c. An identity of interest between or among parties exists such that affiliation may be found.
  - 2. In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.
- B. **Affirmative Action** means; positive activities undertaken to eliminate discrimination and effects of past discrimination and to ensure nondiscrimination practices in the future.
- C. **Alaska Native** means; a citizen of the United States who is a person of one-fourth degree or more Alaska Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.
- D. **Alaska Native Corporation (ANC)** means; any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in Accordance with the Alaska Native Claims Settlement Act, as amended (43U.S.C. 1601, et seq.).
- E. **Challenge** means; a formal filing by a third party to rebut the presumption that a particular individual is socially and economically disadvantaged.
- F. **Compliance** means; that a recipient has correctly implemented the requirements of 49 CFR Part 26.
- G. **Condition of Award** means; the condition(s) of the formal decision of the Contracting Agency to accept the lowest responsible and responsive bidder for the work.
- H. **Consultant** means; one who gives expert or professional advice.

- I. **Contract** means; a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease and agreement is considered to be a contract.
- J. **Contracting Agency** means; any agency that administers contracts using USDOT funds.
- K. **Contracting Opportunity** means; any decision by a recipient or contractor to institute a procurement action to obtain a produce or service commercially (as opposed to intergovernmental actions).
- L. **Contractor** means; one who participates through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit, or airport program.
- M. **Disadvantaged Business Enterprise or DBE** means; a for-profit small business concern:
  - 1. That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
  - 2. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- N. **Goal** means; a numerically expressed objective which recipients or contractors are required to make good faith efforts to achieve.
- O. **Good Faith Efforts** means; efforts to achieve a DBE goal or other requirement of CFR 49 Part 26 which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirements. Specific actions are delineated under Appendix A of 49 CFR Part 26.
- P. **Immediate Family Member** means; father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.
- Q. **Indian Tribe** means; any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.
- R. **Joint Venture** means; an association of a DBE firm and one or more other firms to carry out a single, for profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

- S. **Native Hawaiian** means; any individual whose ancestors were natives prior to 1778, of the area which now comprises the State of Hawaii.
- T. **Native Hawaiian Organization** means; any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.
- U. **Noncompliance** means; that a recipient or subrecipient has not correctly implemented the requirements of 49 CFR Part 26.
- V. **Operating Administration (OA)** means; any of the following parts of the USDOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The “administrator” of an operating administration includes his or her designees.
- W. **Personal Net Worth** means; the net value of the assets of an individual remaining after total liabilities are deducted. An individual’s personal net worth does not include: The individual’s ownership interest in an applicant or participating DBE firm and the individual’s equity in his or her primary place of residence. An individual’s personal net worth includes only his or her own share of assets held jointly or as community property with the individual’s spouse.
- X. **Primary Industrial Classification** means; the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NACS manual and applicable codes.
- Y. **Primary Recipient** means; a recipient which USDOT financial assistance and passes some or all of it on to another recipient.
- Z. **Principal Place of Business** means; the business location where the individuals who manage the firm’s day-to-day operations spend most working hours and where top management’s business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.
- AA. **Program** means; any undertaking on a recipient’s part to use USDOT financial assistance, authorized by the laws to which this part applies.
- BB. **Quotas** means; proportional share, as of goods, assigned to a group or to each member of a group.
- CC. **Race-Conscious measure or program** means; one that is focused specifically on assisting only DBEs, including women-owned DBEs.

- DD. **Race-Neutral measure or program** means; one that is, or can be, used to assist all small businesses. For the purpose of 49 CFR Part 26, race-neutral includes gender-neutrality.
- EE. **Recipient** (to include subrecipient) means; any entity, public or private, to which USDOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.
- FF. **Secretary** means; the Secretary of Transportation for WSDOT or his/her designee.
- GG. **Set-Aside** means; a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.
- HH. **Small Business Administration (SBA)** means; the United States Small Business Administration.
- II. **Small Business Concern** means; with respect to firms seeking to participate as DBEs in USDOT-assisted contracts, a small business concern as defined pursuant to Section 3 of the Small Business Act and SBA regulations implementing it (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR Part 26.65 (b).
- JJ. **Socially and Economically Disadvantaged Individual** means; any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:
1. Any individual who a recipient finds to be socially and economically disadvantaged on a case-by-case basis.
  2. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
    - a. “Black Americans” which includes having persons of origins in any of the Black racial groups of Africa;
    - b. “Hispanic Americans” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture, regardless of race;
    - c. “Native Americans” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
    - d. “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;



- e. “Subcontinent Asian American,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka;
  - f. Women;
  - g. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
- KK. **Transit Vehicle** is; a vehicle used by an FTA recipient, e.g., bus, railcar, or van, for the primary program purpose of public mass transportation (this definition does not include locomotives or ferry boats).
- LL. **Transit Vehicle Manufacturer (TVM)** is; a manufacturer of vehicles used by FTA recipients for the primary program purpose of public mass transportation, e.g., buses, railcars, vans. The term does not apply to firms which rehabilitate old vehicles or to manufacturers of locomotives or ferry boats. The term also refers to distributors and/or dealers in transit vehicles with respect to requirements of 49 CFR Part 26.
- MM. **Tribally-Owned concern** means; any concern at least 51 percent owned by an Indian tribe as defined in 49 CFR Part 26.
- NN. **Unified Planning Work Program (UPWP)** means; a listing of planning projects proposed for funding by FTA.
- OO. **USDOT** means; the United States Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).
- PP. **USDOT-Assisted Contract** means; any contract between a recipient and a contractor (at any tier) funded in whole or in part with USDOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.
- QQ. **WSDOT** means; the Washington State Department of Transportation.



#### **IV. Nondiscrimination**

Pursuant to 49 CFR Part 26.7, WSDOT and its subrecipients shall not exclude any person from participation in, deny any person the benefits of, otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In the administration of its DBE program, WSDOT and its subrecipients shall not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

Any subrecipient, contractor, subcontractor, or consultant who believes they have been discriminated against based on the aforementioned factors may file a complaint using the WSDOT External Discrimination Complaint Procedure (Appendix 1).



## **V. USDOT Issued Guidance and Interpretations**

Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with 49 CFR Part 26 and issued after March 4, 1999 have definitive, binding effect in implementing the provisions of 49 CFR Part 26 and constitute the official position of the United States Department of Transportation.

The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning 49 CFR Part 26. Written interpretations and guidance are valid and binding, and constitute the official position of the U.S. Department of Transportation, only if they are issued under the signature of the U.S. Secretary of Transportation or if they contain the following statement:

*The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 26.*



## **VI. Records and Reports**

### **A. WSDOT and Subrecipients**

In order to monitor the progress of its DBE program, WSDOT and its subrecipients will develop and maintain a record keeping system which will identify and assess DBE contract awards, prime contractors' progress in achieving DBE subcontract goals, and other DBE affirmative action efforts. Specifically, WSDOT and its subrecipients will maintain records (for a period of seven years) showing:

1. Procedures followed by WSDOT and its subrecipients as set forth in this program, to identify and assess DBE contract awards and progress in achieving prescribed goals;
2. Specific efforts to identify and award contracts to DBEs;
3. Amount paid to each DBE subcontractor by a contractor and reported to the contracting agency on a quarterly basis; and
4. Amount paid to each DBE subcontractor by a contractor based on contractor's "Affidavit of Amounts Paid" and reported to the contracting agency once a year and/or obtained at the conclusion of each project.

These reports shall include as a minimum:

1. The number of contracts awarded to DBEs;
2. A description of the general categories of contracts awarded to DBEs;
3. The dollar value of contracts awarded to DBEs;
4. The percentage of the dollar value of all contracts awarded to DBEs; and
5. An indication of whether and the extent of which the percentage met or exceeded the goal specified in the application.

The records and reports required shall provide information relating to firms owned and controlled by minorities separately from information relating to firms owned and controlled by women.

Records shall be available upon request of an authorized officer or employee of the government.

WSDOT and its subrecipients shall submit reports conforming in frequency and format to existing contract reporting requirements of the applicable departmental element. Where no such contract reporting requirement exist, DBE reports shall be submitted quarterly.

B. Contractor Bidders List

WSDOT and its subrecipients will also create and maintain a bidders list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on USDOT-assisted projects. **The list shall include all firms that bid on prime contracts or bid or quote subcontracts (successful and unsuccessful) on USDOT-assisted projects, including both DBEs and non-DBEs.** The list shall also include the following information:

1. Firm name;
2. Firm address;
3. Firm's status as a DBE or non-DBE;
4. The age of the firm; and
5. The annual gross receipts of the firm.

In order to facilitate the receipt of this information, WSDOT will annually disseminate a "receipt directed" contractor survey to encourage all firms that have bid or quoted contracts to make themselves known to WSDOT and/or its subrecipients. If this method fails in its intent, WSDOT will make the submittal of this information a contract requirement.

C. Prime Contractors and Subcontractors

1. All records relating to the DBE program (including payments to DBEs) shall be maintained by the contractor and each subcontractor during the course of the project and preserved for a period of three years following the performance of the contract;
2. The contractor or subcontractor shall make records pertaining to the DBE program (including subcontractor payment information) available for inspection, copying or transcription by authorized representatives of WSDOT, subrecipients, and/or USDOT and shall permit such representatives to interview employees as necessary;
3. Through the use of an affidavit of subcontractor's payment (submitted by the prime on a quarterly basis), WSDOT and its subrecipients will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award; and
4. WSDOT and its subrecipients will perform quarterly audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

Failure to submit the required records upon request or to make such records available may be grounds for sanction actions.



## **VII. Assurances**

Pursuant to 49 CFR Part 26.13, WSDOT has signed the following assurance, applicable to all USDOT assisted contracts and subcontracts and their administration:

*The WSDOT shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT-assisted contract and/or agreement or in the administration of its DBE program or the requirements of 49 CFR Part 26. The WSDOT shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT-assisted contract and agreements. The WSDOT's DBE program, as required by 49 CFR Part 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to WSDOT of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

The above assurance shall appear in all financial assistance agreements with WSDOT subrecipients.



## **VIII. Local Agency and Subrecipient Requirements**

- A. All subrecipients must follow the requirements of 49 CFR Part 26 including insertion of DBE clauses in grant agreements and contracts. WSDOT will require subrecipients to take all steps necessary to carry out all applicable parts of these regulations. The subrecipients will develop a DBE program as required by federal law, or adopt and abide by WSDOT's DBE program. WSDOT will make an effort to ensure the subrecipients comply with 49 CFR Part 26.
- B. Pursuant to 49 CFR Part 26.13, each contract a subrecipient signs with a contractor and each subcontract signed (all tiered) must include the following assurance:

*The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of USDOT-assisted contracts and/or agreements. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract and/or agreements or such other remedy as the recipient deems appropriate.*

- 1. Procedures

Upon approval of the WSDOT DBE Participation Plan by USDOT, all subrecipients shall be notified in writing by WSDOT's Highways and Local Programs Service Center (or Public Transportation and Rail Division for FTA subrecipients) that they must either adopt said document or prepare their own and submit it to WSDOT for approval by June 1 of each year.

- 2. Subrecipient Adoption of USDOT Approved WSDOT DBE Participation Plan

Subrecipients electing to adopt the WSDOT program document shall submit written confirmation of such action duly signed by the appropriate executive officer having legal authority to obligate the subrecipient.

WSDOT shall provide those subrecipients choosing to prepare their own program documents written notice of all document amendments. Subrecipients shall provide written confirmation of adoption and incorporation of such amendments. Subrecipients will be required to submit annually, overall DBE participation goals (by June 1) utilizing a WSDOT approved overall DBE goal setting methodology.

- 3. Subrecipients Preparation and Submission of a DBE Participation Plan to WSDOT for Approval

Subrecipients electing to prepare their own plan shall submit the plan to WSDOT for review and approval, signed by the appropriate executive officer. WSDOT shall provide written notice to subrecipients of plan deficiencies to be corrected prior to approval.

After approval of the plan by WSDOT, subrecipients shall submit written requests to WSDOT's Highways and Local Programs Service Center (or Public Transportation and Rail Division for FTA subrecipients) for approval of all proposed amendments. Subrecipients will be required to submit annual updates to WSDOT reflecting program activities for the reporting period.

WSDOT will select and conduct reviews of subrecipients having adopted the WSDOT DBE Participation Plan to ensure program compliance.

Although WSDOT is no longer required to submit annual updates to USDOT, it will still require annual updates for all subrecipients who develop their own plans.

WSDOT will monitor all of its subrecipients activities through its Highways and Local Programs Service Center (or Public Transportation and Rail Division for FTA subrecipients) to ensure their complete implementation and compliance with the DBE Program Participation requirements. Subrecipients will be required to report their activities and results of the DBE program.

Assistance to subrecipients in the establishment and enforcement of the DBE goal requirements shall be provided through the WSDOT Highways and Local Programs Service Center (or Public Transportation and Rail Division for FTA subrecipients). The Office of Minority and Women Business Enterprises will make its directory of certified firms available to subrecipients.

## **IX. Liaison Officer**

### **A. Designation of Liaison/Responsibilities**

In order to ensure compliance and consistency regarding the DBE Program, the Director, Office of Equal Opportunity (OEO), WSDOT, shall be designated as the DBE Liaison Officer, responsible for the development, management, and implementation of the department's DBE program. The Director will report directly to the Secretary of Transportation. The Director may delegate liaison authority to the Manager of the External Civil Rights Branch (ECRB). The Manager is responsible for the daily administration and implementation of the program and reports directly to the Director, OEO.

1. The Liaison Officer's responsibilities include, but are not limited to the following:
  - a. Obtaining approval of the DBE Policy Statement from the Secretary of Transportation;
  - b. Establishing program standards in accordance with federal regulations;
  - c. Evaluating the program's effectiveness;
  - d. Reviewing and approving the Annual Overall DBE Goal;
  - e. Administering the DBE Supportive Services Consultant Contract;
  - f. Administering the OMWBE Certification Supportive Services Interagency Agreement;
  - g. Provides for sufficient staff to administer program; and
  - h. Identify and establish other support staff functions and time involved;
2. The Manager's responsibilities include, but are not limited to the following:
  - a. Developing a departmental DBE Policy Statement;
  - b. Implementing policy statements, program standards, and coordinating the external/internal communications of the policy statement;
  - c. Monitoring and evaluating program effectiveness;
  - d. Developing WSDOT's construction, WSF and transit project contract goals, and when necessary, to meet the agency's overall DBE goal, leasing goals for airports and ferry terminals;
  - e. Providing technical information to DBEs and non-DBE prime contractors;
  - f. Developing and evaluating the department's general specifications, guidelines, policies, and regulations affecting the program;
  - g. Management of the WSDOT DBE Supportive Services Consultant Contract; and
  - h. Management of the OMWBE Interagency Agreement;

### 3. Organizational Structure

ECRB is staffed with a Manager, three Contract Compliance Officer IIIs, two Contract Compliance Specialist IIs, one Contract Compliance Assistant, one Title VI Coordinator, and one Administrative Assistant. An additional Contract Compliance Officer III/EEO Officer is stationed and supervised in the Northwest Region. Additionally, there is one EEO Officer located in each of the six regions and at the Washington State Ferries (WSF). Each of these officers work part-time on civil rights activities (with the exception of the full-time EEO Officer in the Northwest Region).

**X. Minority and Women-Owned Financial Institutions**

Pursuant to 49 CFR Part 26.27, WSDOT encourages prime contractors to make use of banks and lending institutions owned and controlled by minorities and women. The state of Washington currently has no minority or women-owned banks. WSDOT will continue to investigate the availability of minority and women-owned banks.

If through our investigation, minority and/or women-owned banks are found, WSDOT shall, by letter, inform minority and women-owned financial institutions of the provisions contained in CFR 49 Part 26, relative to opportunities for their use in transportation-related construction projects. WSDOT shall request that minority and women-owned financial institutions provide the department with documents outlining the extent of the services offered by such institutions. WSDOT shall disseminate information of the services offered by such institutions to the construction industry. This task will be accomplished in part through the DBE Supportive Services consultant agreement, preconstruction conferences, compliance reviews, WSDOT Web Page, and through the DBE Supportive Services newsletter.





## **XI. Required Contract Clauses**

Each contract WSDOT and/or its subrecipient(s) signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) shall include the following assurances:

*The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of USDOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract or such other remedy as the recipient deems appropriate.*



## **XII. Prompt Payment**

Pursuant to 49 CFR Part 26.29 (1999), WSDOT and its subrecipients shall ensure that the following clauses are placed in every USDOT-assisted contract:

*The contractor or subcontractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract and/or agreement no later than ten (10) days from the receipt of each payment the prime contractor receives from WSDOT or its subrecipients. The prime contractor agrees further to return retainage payments to each subcontractor within ten (10) days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the WSDOT. This clause covers both DBE and non-DBE contractors.*

### **A. Subcontractor Payment**

As required by RCW 39.04.250, once the Contractor has been paid by the Contracting Agency, the Contractor has a duty to forward to the subcontractor the portion of the payment performed by the subcontractor unless there is a bona fide dispute as to the subcontractor's entitlement. This payment must be made within ten (10) days after the Contractor receives payment from the Contracting Agency. Failure to pay the subcontractor in a timely basis subjects the Contractor to liability for interest at the highest rate allowed under RCW 19.52.025 as well as attorney fees if the subcontractor must sue to collect amounts wrongfully withheld.

If a bona fide dispute occurs and part or all of the payment is withheld, the Contractor must comply with the applicable sections of RCW 39.04.250 and RCW 39.76.011, including timely notification to the subcontractor as to what remedial action must be taken before the withheld amount can be released.

Under the Washington State Public Disclosure Laws, chapter 42.17 RCW, subcontractors are permitted to inspect and copy contract and/or agreement progress estimates upon proper request. These estimates detail the quantities of all items paid to date.

### **B. Release of Subcontractor Retainage**

49 CFR Part 26.29 require contractors on projects receiving federal aid to release in a timely manner retainage withheld by them or retainage bonds required by them from subcontractors upon satisfactory completion and acceptance of the subcontract work.

1. Timely release means that the retainage must be released to the subcontractor within ten (10) calendar days after the Contractor and Contracting Agency has determined that the subcontract has been satisfactorily completed.
2. In determining whether satisfactory completion and acceptance has been achieved, the Contractor and Contracting Agency may require the subcontractor to provide final lien releases from laborers, lower tier contractors, and materialmen who have furnished labor and materials for the subcontractor's work.

When the Contractor and Contracting Agency has determined that the subcontractor has not achieved substantial completion of the subcontract, the Contractor must provide the subcontractor with the information required by RCW 39.76.011 identifying as prescribed by that statute the remedial action that must be taken by the subcontractor before retainage can be released.

Section B does not apply to retainage withheld by the Contracting Agency from monies earned by the Contractor. The procedure for release of that retainage is set forth in Chapter 60.28 RCW.

Section A and B do not create any contractual relationship between the Contracting Agency and any subcontractor; and are not intended to bestow upon any subcontractor the status of a third-party beneficiary to the contract between the Contracting Agency and the Contractor. The purpose of these sections is to advise the Contractor of certain federal regulations and state laws regarding prompt payment to which the Contractor has agreed to follow under its contractual agreement with the contracting agency.

### **XIII. DBE Directory**

In order to assist contractors in the selection of eligible DBE firms, a DBE Directory is maintained and published by the Washington State Office of Minority and Women's Business Enterprises (OMWBE). The directory is published in hard bound copy quarterly and made available to contractors, proposal holders, and bidders to facilitate the identification of DBEs with capabilities relevant to highway construction, and other construction and development projects. The directory lists the name, address, telephone number, name of contact person, standard industrial classifications (SIC codes\*), and activity descriptions of each business certified by OMWBE as eligible to participate as a DBE.

Additionally, WSDOT has a Web Page on the Internet listing the DBE Directory published by OMWBE. The certified DBE firms can be accessed by either firm name or Standard Industry Classification (SIC) Code. The Internet directory is updated weekly by WSDOT. WSDOT requires a report of the DBE Directory distribution from OMWBE as part of their Annual Update.

\*OMWBE shall implement the North American Industrial Classification System (NAICS) upon completion of its development by U.S. Department of Commerce. Thereafter, all references in this plan to the Standard Industrial Classification (SIC) Code System shall be deemed to refer to the appropriate section of NAICS.



#### **XIV. Over-Concentration of DBEs**

Pursuant to 49 CFR Part 26.33, if WSDOT (and/or its subrecipients) determine that DBE firms are so over-concentrated in one or more types of work as to unduly burden the opportunity of non-DBE firms to participate in that type of work, it will devise appropriate measures to address this over-concentration. These measures may include:

1. Technical assistance;
2. Business development; and
3. Any other measures to assist DBEs in performing in other types of work.

To date, WSDOT has not concluded that the condition exists or is a result of the implementation of the DBE Program.





## **XV. Business Development Program**

Pursuant to 49 CFR Part 26.35, WSDOT may establish a DBE Business Development program to assist firms in gaining the ability to compete successfully in the market place outside the DBE Program.

WSDOT believes its current DBE Supportive Services program supports the development and eventual self-sufficiency of DBEs. The WSDOT DBE Supportive Service Program includes, but is not limited to providing DBEs assistance in:

1. Engineering and technical assistance;
2. Construction project management;
3. Bond preparation;
4. Conduct training workshops and seminars; and
5. Construction office accounting and management, and other such assistance as deemed necessary to promote the success and profitability of DBE firms.



## **XVI. Monitoring and Enforcement**

### **A. Procedures for Ensuring Compliance**

WSDOT will bring to the attention of the USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment, or Program Fraud and Civil Penalties rules).

To ensure all obligations under contracts awarded to DBEs are met, WSDOT shall review the contractor's DBE involvement efforts during performance of the contract. The reviews are generated from three approaches:

1. The region's designated EEO Officer may request a review based on an apparent violation observed by an on-site inspector;
2. A scheduled DBE review by the OEO; and
3. Highways and Local Programs Service Center's "Local Agency Review" process. (See *Local Agency Guidelines*, Chapter 26.2.1.)

### **B. An observed violation will result in a Contract Compliance Review as follows:**

1. Possible violation observed and reported on WSDOT DBE On-Site Review Form by the Project Engineer.
2. The Project Engineer notifies the prime and DBE subcontractor of the apparent violation and requests a meeting to address and rectify the violation. If the prime and DBE fail to respond or if the issue cannot be resolved at the regional level, notification will be forwarded to OEO for further action.
3. If it is determined by OEO that an unresolvable violation has occurred, OEO will issue a "30-Day Show Cause Notice," jointly signed by the OEO Director and the Assistant Secretary, Field Operations Support Service Center (for subrecipients, the respective Assistant Secretary of Highways and Local Programs Service Center or the Director of Public Transportation and Rail Division). The Show Cause Notice formalizes the charge of contract violation and cites the remedies available to WSDOT by statute. Failure of the prime contractor to respond to the notice will result in a "Letter of Intent" to assess civil penalties and/or sanctions. The prime contractor will be advised of the appeal procedures available through an Administrative Law Judge as described below. If the final order affirms the initial findings of OEO, civil penalties and/or sanctions will be assessed as stated in the "Letter of Intent."

### **C. Planned Contract Compliance Reviews are conducted as follows:**

1. DBE contract compliance reviews are initiated by OEO on a contract-by-contract basis. Contracts are selected to be reviewed based on the dollar amount of the contract, number of DBE subcontractors on the project, the type of the work subcontracted, and deficiencies (red flags) noted in field reports or monitoring efforts. These reviews focus on a specific contract, the prime contractor, and generally all DBE COA subcontractors on the project.

2. Both the prime contractor and the DBE subcontractors are notified, by certified letter, of the pending review and are required to present documentation supporting their firm's compliance with the contract provisions.

If, at the conclusion of the review it is determined that a violation of the contract provision has occurred, credit for specific items of the work may be disallowed, substitution may be required, and applicable penalties and/or sanctions may be imposed.

Authority for such sanctions and/or penalties is derived from 49 CFR, Part 26, and all applicable state law and regulations as well as the contract provisions. The following language is included in the contract provisions:

*If a person, firm, corporation, or business does not comply with any provision of its contract as required under 49 CFR, Part 26, and/or any other applicable law or regulation regarding DBE, the state may withhold payment, suspend, or terminate the contract, and subject the contractor to civil penalties of up to ten percent of the amount of the contract for each violation. Willful repeated violations, exceeding a single violation, may disqualify the contractor from further participation in state contracts for a period of up to three years. An apparent low bidder must be in compliance with these contract provisions as a condition precedent to the granting of a notice of award by WSDOT. The contractor is entitled to request an adjudicative proceeding with respect to WSDOT's determination of contract violation and assessed penalties by filing a written application within thirty days of receipt of notification. The adjudicative proceeding, if requested, will be conducted by an administrative law judge pursuant to the procedures set forth in RCW 34.05 and Chapter 10.08 of the Washington Administrative Code.*

#### D. Commercially Useful Function

WSDOT counts towards its DBE goals only the expenditures to DBEs that perform a Commercially Useful Function (CUF) in the work of the contract as defined in 49 CFR Part 26. A DBE is considered to perform a CUF when it is responsible for execution of a distinct element of the work of a contract and/or agreement and carrying out its responsibilities by actually managing, performing, and supervising the work involved. Industry practices and other relevant factors may be considered in determining a CUF. When industry practices conflict with the federal DBE Program requirements, federal requirements will prevail. In no case shall the DBE contractor or subcontractor, including SBA 8(a) certified businesses, relinquish control of their assigned items of work. Likewise, the DBE contractor or subcontractor will perform the work under contract and will receive payment proportionate to the work performed. **Credit toward DBE goals shall be awarded only for the portion of work performed by the DBE and when payments, including retainage payments, have been made to the DBE.**

Consistent with normal industry practices, a DBE may enter into contracts, subcontracts and/or agreements. A DBE subcontractor, as well as any other subcontractor, may not subcontract greater than 25 percent of its items of work.

**WSDOT and its subrecipients will take appropriate sanctioning measures whenever CUF violations are uncovered and are determined to be violations of program requirements. This to be done only after due process has been afforded the contractor.**

E. Consultant Agreement Compliance

1. WSDOT will notify the successful Consultant of the award of the agreement in writing;
2. Work committed to DBEs by the Consultant must be performed by the designated DBE or a WSDOT-approved substitute. DBE consultant work items will not be performed by the Prime Consultant in lieu of subconsulting without approval of WSDOT;
3. In the event work committed to a DBE does not materialize as anticipated, the Prime Consultant will commit to increasing the work to committed DBEs or add additional DBEs, as needed, to meet the contract goal;
4. WSDOT reserves the right to inspect all records of the Prime Consultant and its subconsultants and all records of the DBEs concerning this agreement;
5. The Prime Consultant will provide WSDOT OSC Consultant Service Center copies of the completed and signed agreements with the DBEs. These agreements must be submitted prior to the DBE beginning work;
6. The Prime Consultant will comply with RCW 39.04.250 and RCW 39.76.011, regarding prompt payment laws; and
7. The Prime Consultant will provide certification letter to WSDOT showing amounts paid to subconsultants. No credits for DBE participation will be given until the subconsultant has received payment.

F. Substitutions

1. Construction Contracts

The contractor must notify and obtain written approval from the WSDOT Office of Equal Opportunity (OEO) (for local agency projects, WSDOT Highways and Local Programs Service Center) prior to replacing a DBE or making any change in the participation. Approval for replacement will be granted only if it is demonstrated that the DBE is unable or unwilling to perform. The contractor must make every good faith effort to find another DBE subcontractor to substitute for the original DBE. The good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the original DBE, to the extent needed to meet the contract goal. (See: XXIV "Contractors' Good Faith Efforts.")

Any deviation from the DBE condition of award letter or contract specifications must be approved by Change Order issued by the WSDOT Olympia Service Center (OSC) Construction Office in concurrence with OEO. Change orders issued by subrecipients must have the concurrence of the Highways and Local Programs Service Center and OEO. Affected DBEs shall be notified in writing of any changes in the scope of work which result in a reduction in the dollar amount of Condition of Award (COA) to the contract. The contractor must make the request for approval of the reduction of the amount awarded through a Change Order signed by the prime contractor with a copy to be sent to the COA subcontractor.

The contractor's ability to negotiate a more advantageous bid with another subcontractor will not be considered a valid basis for replacement. Requests to substitute committed DBEs will be scrutinized closely.

The contractor must document efforts made at the time of commitment to determine that the DBE was capable of performing the work and subsequent efforts were made to enable the DBE to perform. The evidence must show that the contractor investigated the DBE's capacity and capability of performing at the time of the commitment. The DBE must have possessed or have had access to adequate resources and work force. The evidence must also show that the contractor assisted the DBE with supportive actions to enable the DBE to perform.

a. Substitutions may be required under the following conditions:

- (1) The elimination of an item of work which was a Condition of Award (COA) to a DBE. The DBE firm originally proposed to perform the work must be notified in writing when the elimination of the item of work is proposed by the prime contractor;
- (2) The DBE firm listed as a COA for the contract goes out of business prior to the completion of the work;
- (3) Poor or slow performance of the items of work assigned to the DBE. However, prior approval of the DBE substitution by OEO is required. Substituting the prime contractor's own work force and equipment to complete any items of work assigned to the DBE as a COA requires prior approval from OEO and a change order;
- (4) Failure of a DBE to perform a CUF in the execution of its items of the work. This may be remedied by substitution, with prior approval of OEO; and
- (5) A DBE found to be decertified or one who became ineligible after bid opening, but prior to contract award, will be required to be substituted with another DBE firm or firms performing the same dollar value COA to the project.

WSDOT must approve all substitutions of DBE subcontractors after bid opening and during the execution of the contract.

After award, and throughout the life of the contract, any DBE firm that is found by OMWBE to be ineligible, or becomes unable or unwilling to perform their work, shall be replaced by the contractor with another certified DBE to meet the project goal, at no additional cost to the Contracting Agency. Documentation of a “good faith effort” (see: XXIV. Contractors “Good Faith Effort”) may be accepted in lieu of an actual substitution of another firm.

- b. Substitutions will not be permitted under the following conditions:
  - (1) The successful low bidder fails to inform the DBE prior to bid submittal that the bidder’s union agreements require the bidder’s subcontractors to have their own union agreements.
  - (2) The successful low bidder fails to inform the DBE prior to bid submittal of bonding requirements that the bidder will impose on its subcontractors.
- c. Exceptions to substitution requirements:
  - (1) If the substitution is initiated by the DBE, and the prime contractor has exceeded the established DBE goal, WSDOT may not request substitution if the excess DBE amount covers the DBE COA portion and a CUF review has been performed on the firm(s);
  - (2) If the deletion of the DBE work is initiated by the State, and insufficient work remains on the contract, WSDOT may relieve the prime contractor from attainment of that portion of the goal; and

## 2. Substitutions (Consultant Agreements)

The above substitution requirements and procedures are the same with the exception of:

- a. There is no condition of award requirement. Consultants will be held accountable for DBE commitment as reflected by their DBE Utilization Plan submittal (see Appendix 2).
- b. A supplemental agreement replaces the change order requirement.

#### G. Violations of DBE Provisions

When a contractor violates the DBE provisions of the contract, the Contracting Agency may incur damages. These damages consist of additional administrative costs including, but not limited to, the inspection, supervision, engineering, compliance, and legal staff time and expenses necessary for investigating, reporting, and correcting violations as well as loss of federal funding. Damages attributable to a contractor's violations of the DBE provisions may be deducted from progress payments due to the contractor or from the retainage withheld by the Contracting Agency as allowed by RCW 60.28.020. Before any money is withheld, the contractor will be provided with a notice of the basis of the violations and an opportunity to respond.

The Contracting Agency's decision to recover damages for a DBE violation does not limit its ability to suspend or revoke the contractor's pre-qualification status or seek other remedies as allowed by federal or state law. In appropriate circumstances, the Contracting Agency may also refer the contractor to state or federal authorities for additional sanctions.



## **XVII. Use of Set-Asides or Quotas**

### **A. Quotas**

Pursuant to 49 CFR Part 26.43, WSDOT and its subrecipients are not permitted to use quotas for DBEs on USDOT-assisted contracts.

### **B. Set-Asides**

The Washington State Department of Transportation does not have the authority to assist DBEs through a set-aside program since the program would be in violation of state law RCW 47.28 requiring WSDOT transportation-related contracts to be awarded to the lowest responsible bidder. The Office of the Washington State Attorney General has issued an opinion on RCW 47.28 affirming the meeting of DBE goals through subcontracting. This opinion has been submitted to FHWA.



## **XVIII. Overall DBE Goals**

The purpose of the overall goal is to achieve a “level playing field” for ready, willing, and able Disadvantaged Business Enterprises (DBEs) seeking to participate in Washington State Department of Transportation federally-assisted contracts. In an effort to reach this level playing field, WSDOT examined its programs and relevant local markets, then determined the amount of participation DBEs would be expected to achieve in the absence of present and past effects of discrimination.

49 Code of Federal Regulations (CFR) Part 26.45 requires recipients of USDOT federal aid to utilize a two step process in the development of their Overall DBE Goals:

Step One: Calculate relative availability of certified firms ready, willing, and able to work on USDOT-assisted contract and/or agreements.

Step Two: Adjust calculation to account for other evidence. (Once recipient has base figure resulting from Step One calculation, recipient must seek more data, with which to adjust base figure up or down.)

### **A. Determining the Base Figure for FHWA Recipients Overall Goal (Step One)**

The first step in the process was to determine a base figure for the Overall Goal. This figure is a measurement of the current percentage of ready, willing, and able certified firms and is based on demonstrable evidence of WSDOT’s relevant market conditions.

In determining this evidence, WSDOT decided to utilize data sources deemed immediately available to the department, such as, the Washington State Office of Minority, Women and Disadvantaged Business Enterprises (OMWBE) Directory of Certified Firms, and the Census Bureau Database - County Business Patterns (CBP) for all firms.

WSDOT first assessed the number of ready, willing and able certified firms listed in the OMWBE Directory. WSDOT counted only firms involved in transportation related contracting and consulting and sorted them by Standard Industrial Classification (SIC) Code. Next, WSDOT grouped those firms by SIC code into the two categories where the department expended the most federal aid dollars (93.78%):

1. Construction (88.3%) — 538 certified firms.
2. Architecture, Engineering, and Professional Services (5.48%) — 1,076 certified firms.
3. The remaining 6.22% of the federal aid dollars was spent for Purchased Goods (.047%) and Purchased Services (5.75%). In calculating the overall DBE goal, WSDOT did not include these dollars because of the small dollar amount expended and because of the difficulty WSDOT experienced in sorting the CBP data in those areas. Consequently, the construction dollars were converted from 88.3 percent of the total to 94 percent of the total and

architecture dollars were converted from 5.48 percent to 6 percent of the total in order to equal 100 percent; and, because the result goal will be applied to Construction and A&E dollars.

Construction	88.30	94.00
A&E	5.48	6.00
PG&PS	<u>6.22</u>	<u>0.00</u>
	100.00	100.00

The above numbers representing 1,614 certified firms became the numerator to the formula.

In determining the denominator, WSDOT used the Census Bureau's CBP database (as recommended by the USDOT). The CBP contains data on the total number of firms (certified and noncertified ) in the state of Washington within the same SIC codes identified by the department in the numerator. Firms were counted only once based on their primary SIC code. We then sorted the CBP firms by SIC code and grouped them into the same categories as in the numerator:

1. Construction — 5,338 firms.
2. Architecture, Engineering, and Professional Services — 3,800 firms.

The above numbers representing 9,138 firms became the denominator to the formula.

WSDOT calculated its base figure by first determining the number of certified firms in the OMWBE directory (1,614) for each of the groups, then extracting the availability of CBP firms (9,138) for the same groups by SIC code.\*

The following calculation was performed to arrive at the base figure for step one of the Overall Goal setting process:

$$\begin{array}{rcccl}
 & \text{Certified Firms} & & \text{Certified Firms} & \\
 & \text{in Const.} & & \text{in A\&E, Prof. Serv.} & \\
 \text{Base} & 538 & & 1,076 & \\
 \text{Figure} = & \frac{.94}{5,338} & + & \frac{.06}{3,800} & \times 93.78 \\
 & \text{CBP firms} & & \text{CBP firms in} & \\
 & \text{in Const.} & & \text{A\&E, Prof. Serv.} & 
 \end{array}$$

Based on the above calculations, the **Base Figure** for the WSDOT FFY 2000 DBE Overall Goal is: **11.17%**

\*(Construction SIC codes: 0781, 1442, 1611, 1622, 1623, 1629, 1711, 1721, 1731, 1791, 1795, 3441, 4212, 5032)

(Professional Services, Architecture, and Engineering SIC codes: 8711, 8712, 8713, 8741, 8742, 8748)  
(See Appendix 3, Applicable SIC codes)

B. Adjustment of the Base Figure for the Overall Goal (Step Two)

Similar to other states, WSDOT was faced with a short time frame in which to develop its new DBE Plan. This factor limited our ability to obtain and examine widespread evidence under Step 2 of the overall goal setting process. The information herein represents WSDOT's best effort under these circumstances.

In considering the examples of evidence described in 26.45, the state concluded the following: *Disparity Studies* — WSDOT contracted with a consultant to conduct a statewide disparity study. However, the study has not been finalized, rendering it unusable at this time. *Barriers* — Due to the short time frame, we were unable to readily identify barriers which may impact DBE participation. Bonding and financing have not been issues. WSDOT, through its DBE Support Services consultant, has been very aggressive in assisting DBEs with bonding and financing matters. *Employment Data* — We utilized information provided to us by the Washington State Office of Minority and Women Business Enterprises, as well as feedback from three of our largest local agencies (cities of Seattle and Tacoma and King County).

The most supportable type of evidence readily available to WSDOT was the current capacity of DBE firms, as measured by the volume of work they have performed in recent years. WSDOT determined their proven DBE capacity to be approximately 18 percent over a five-year period, 1994-1998 (see table below).

Fiscal Year	DBE Participation	Total Federal Aid Contracts in Dollars	Prime Contracts Commitments to DBE in		Subcontractors to DBEs	
			Number	Dollars	Number	Dollars
1994	15.70%	\$ 313,016,950	28	\$ 5,032,112	310	\$44,145,867
1995	18.16	302,715,697	30	7,016,342	464	41,419,776
1996	19.60	249,303,394	36	12,346,055	477	35,623,509
1997	18.63	245,511,339	56	19,862,187	350	25,783,032
1998	19.19	254,232,537	31	7,806,528	520	46,708,014
<b>Totals</b>		\$1,364,779,917		\$52,063,224		\$193,680,198
Percent to Contracts Awarded to DBE Primes			\$52,063,224 \$1,364,779,917		= 3.81%	
Percent of Contracts Committed to DBE Subcontractors			\$193,680,198 \$1,364,779,917		= 14.19%	

Recognizing that we could not rely solely on past performance, WSDOT also considered the following factors in its analysis under Step 2.

1. Personal Net Worth

A new regulation regarding Personal Net Worth (PNW) has been added to the criteria of being a certified DBE. The DBE owner(s) must have a PNW of \$750,000 or less in order to be considered economically disadvantaged. Company owners are allowed to deduct their primary residence and business when calculating their PNW. WSDOT does not have information on the PNW of its currently certified DBEs.

In the construction program, with a small business definition allowing gross receipts to average between \$7.5 million and \$16.6 million over a three-year period, the department has 18 prequalified DBE prime contractors. In Fiscal Year 1998/1999, this group of 18 DBE prime contractors received approximately \$8M in prime contracts. A number of these DBE primes will exceed the new \$750,000 PNW cap resulting in the potential loss of these firms being counted toward the DBE goal. Although the gross receipts cap is less for DBE consultants, the potential for loss based on PNW is also an issue in the consulting category.

In addition, it is estimated that DBEs will be lost because of the perception of intrusive requirements in the new regulations. This includes the requirement of the spouse's PNW information and proof of irrevocable transfer of assets where there is legal authority for joint ownership.

An estimate of the impact of these new regulations is not available, however this has the potential of eliminating several of the larger more active DBE firms.

2. Counting Work Obtained by DBE Primes

Under 49 CFR Part 23, a DBE was allowed to subcontract up to 70 percent of its contract to a non-DBE while still allowing the agency to report 100 percent as DBE participation. Under 49 CFR Part 26, only the amount actually performed by the DBE or the amount subcontracted to another DBE may be counted and reported toward DBE participation.

During the previous five-year period, \$52 million dollars of the work has been performed by DBE primes contributing to 3.81 percent of the overall goals. Under the new counting provisions, if the prime contractors sublet the maximum to non-DBEs, WSDOT would lose, for counting purposes, 2.67 percent of the reported 18 percent goal attainment.

### 3. Counting of Second Tier Subcontractors

WSDOT restricts the amount that a subcontractor can further subcontract to 25 percent of the subcontract. Historically (1994-1998) prime contractors on WSDOT projects subcontracted \$194 million to DBEs. Under the new regs, if the work is further subcontracted to non-DBEs — that portion subcontracted will not be eligible for counting. Assume that the maximum 25 percent permitted to be subcontracted is subcontracted to a non-DBE, under the new regulations \$46 million dollars of work previously counted would no longer be eligible for counting. This would reduce the goal attainment by up to 3.55 percent (25 percent of 14.19 percent).

### 4. Trucking

The new trucking provisions will eliminate a significant amount of participation — independent owner/operators will not be able to contribute to the 51 percent of the DBE's participation and trucks owned by the DBE must be operating on the project. WSDOT is unable to ascertain the specific dollar amount of this impact through accessible information; therefore, it will not attempt to assign a specific impact amount. However, it has been determined that it will impact the overall goal attainment.

Under the new reporting and tracking requirements, this information should be more available next year for review and any necessary adjustments.

### 5. Over-Concentration

Under 49 CFR Part 26, when WSDOT determines that DBE firms are so over concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, WSDOT must devise appropriate measures to address this issue.

WSDOT has not assigned an estimate to this potential factor, but acknowledges that it could have an impact.

Although many impacts of the new reporting requirements are uncertain, they will by themselves reduce the goal attainments in future years. Counting the work obtained by DBE primes and second tier subcontractors could result in a maximum reduction in what was previously eligible by up to 6.22 percent.

Consequently, the original base figure was adjusted to **14%**.

**WSDOT therefore has adjusted its proposed overall DBE goal for Federal Fiscal Year 2000 to 14%.**

WSDOT expects to let \$175 million of USDOT assisted contracts during this fiscal year. This means that we have set a goal of expending \$24.5 million with DBEs.





## **XIX. DBE Overall Goal Submittal Process**

WSDOT as a recipient of USDOT federal aid funds will submit its overall goal to USDOT on August 1 of each year (except September 1, 1999).

Before establishing the overall goal each year, WSDOT will consult with the Office of Minority and Women's Business Enterprises, DBE Supportive Services, minority, women's and general contracting groups, community organizations, and other officials or organizations. Efforts will be made to obtain information concerning the availability of disadvantaged and nondisadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the effects of WSDOT's efforts to establish a level playing field for the participation of DBEs.

As a result, WSDOT will publish a statewide public notice of the proposed goal and methodology. The notice will be available for inspection during normal business hours at the Office of Equal Opportunity and at each WSDOT regional office for a period of 30 days following the date of the notice. Public comments will be accepted up to 45 days from the date of the notice. Additionally, the information will also be provided to major state newspapers, minority-focused media, trade publications and will be listed on the WSDOT web page. Normally, the notice will be issued by June 1 of each year. This notice will include addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed.

The overall goal submission to USDOT will include a summary of information and comments received during the public participation process and the responses.

WSDOT and its subrecipients will begin using the overall goal on October 1 of each year, unless other instructions are received from USDOT.



## **XX. Construction Contract Goals**

WSDOT and the Highways and Local Programs Division each review federally funded projects to determine the appropriateness of establishing DBE goals, prior to soliciting bids. The methodology employed by WSDOT in determining state and local agency project contract goals is described below. WSDOT will periodically review the attainment accomplished through the contract goal setting process to determine its ongoing effectiveness and will adjust its contract goal setting as necessary to meet but not exceed the Department's overall DBE Goal.

### **A. Elements considered by WSDOT in its contract goal setting process.**

1. Geographic location of the project;
2. Type(s) of work included in the project, i.e., structure, roadway, new construction;
3. Availability of DBEs to perform the type(s) of work;
4. Potential subcontractable items of the work; and
5. Total dollar value of the contract.

### **B. WSDOT's Contract Goal Setting Process:**

1. Before beginning the process, WSDOT reviews its overall DBE goal and the means to meet the goal (see: XVIII, Overall DBE Goals and XXIII, Means to Meet the Overall DBE Goal);
2. If the contract includes federal funds and subcontracting opportunities, the evaluation process begins which may lead to the setting of a DBE contract goal as described below.
3. The initial step is to calculate the overall percentage of sub-contracting opportunities within the project. This is done by determining what work will be performed by the prime contractor and what work will remain as sub-contracting opportunities, also referred to as bid items.
  - 3.1 The prime contractor is required to perform a minimum of 30% of the total estimated contract. The largest class(es) of work that add-up to a minimum of 30% of the total estimated contract may be considered work performed by the prime contractor. Mobilization is customarily considered the prime contractor's work;
  - 3.2. In order to identify the remaining sub-contracting opportunities, the division looks at the bid items that are sorted by pre-qualification work classes.
  - 3.3 Once the bid items or work classes are identified, the dollar values for all of the bid items or work classes are totaled. The total dollar amount is then divided by the total project cost. The result is the overall percentage of sub-contracting opportunities.

4. The next step is for WSDOT to take the total sub-contracting opportunities percentage and set an appropriate DBE goal taking into consideration other factors such as DBE availability and prime contractor flexibility as described below:

4.1 WSDOT determines if there are DBE firms currently certified who are ready, willing, and able to perform the subcontractable work and takes into consideration whether such firms are ready, willing and able to go to the geographic location of the work.

4.2 Next, WSDOT looks at the subcontractable work to determine whether the Prime has two means to achieve the DBE goal and adjusts the DBE goal to allow that flexibility.

5. If requested, a dollar goal can be established for a contract that is \$2 million or less.

## **XXI. Consultant Agreement Goals**

WSDOT's Consultant Services Office reviews each federally funded project to determine the appropriateness of establishing DBE goals prior to soliciting proposals. The methodology employed by WSDOT and its Consultant Services Office in determining consultant project goals is as follows:

### **A. Elements**

1. Geographical location of the project;
2. Type(s) of work included in the project;
3. Availability of DBEs to perform the type(s) of work;
4. Potential subcontractable items of work; and
5. Total dollar value of the agreement.

The attainment accomplished through this analysis will be reviewed annually to determine the appropriateness of the method of setting goals.

### **B. Goal Setting Process**

1. Review the department's overall DBE goal and the means to meet the goal (see: XVIII, Overall DBE Goals and XXIII, Means to Meet the Overall DBE Goal).
2. If the agreement includes federal funds, a DBE goal is considered.
3. Determine the subcontractable amount (based on scope submittal), and divided by two (2). (50% of the total identified subcontractable items would be available for DBE firms, while the other 50% would be available for non-DBE firms.
4. Set the goal as a percentage to the nearest whole percent.

### **C. DBE Participation**

1. WSDOT will as part of the advertisement, indicate that the department's overall DBE goal is 14% and that this particular project is federally-assisted. It will require a DBE goal (a percentage of the total agreement amount) which will be determined and set with an approved scope of work.
2. Responsiveness to the DBE goal shall not be determined prior to award. However, failure to meet goal attainment may be utilized as an evaluation criteria on past work performance.
3. The Consultant shall include in their response to a Request for Qualifications an Information Packet that identifies the potential subconsultants, both DBE certified and non-DBE firms.

4. The Consultant will (after award and as part of the negotiation) submit to WSDOT a scope of work and cost estimate that will identify each subconsultant. The consultant will meet the project DBE goal, identifying each subconsulted element of work.
5. The monitoring of DBE and non-DBE participation will be tracked using the monthly prompt payment certification forms obtained from the prime consultant.

D. DBE Participation as a Prime

1. A DBE may participate as a Prime Consultant, subconsultant, in a joint venture with either a Prime Consultant or a subconsultant, or as a vendor of materials or supplies;
2. The DBE joint venture firm shall be responsible for a clearly defined portion of the work to be performed in addition to meeting the requirements for ownership and control; and
3. The Prime Consultant shall, as a minimum, seek DBEs in a reasonable recruitment area in which it generally seeks subconsultants for a given project. If the Prime Consultant cannot meet the goals using DBEs from this area, the Prime Consultant, as part of its good faith effort to meet the goals, shall expand its search to a reasonably wider recruitment area.

E. Substitutions (Consultants)

The Consultant must notify and obtain the written approval by WSDOT Office of Equal Opportunity (OEO) prior to replacing a DBE or making any change in the participation. Approval for replacement will be granted only if it is demonstrated that the DBE is unable or unwilling to perform and that the contractor exercised a good faith effort (see XVI, I “Substitutions” (Consultant Agreements) to enable the DBE to perform.

## **XXII. Transit Vehicle Manufacturers**

Pursuant to 49 CFR Part 26.49, FTA recipients/subrecipients will require each transit vehicle manufacturer, as a condition of being authorized to bid or submit proposals on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, WSDOT and its subrecipients may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the Transit Vehicle Manufacturer complying with this element of the program.





### **XXIII. Means to Meet the Overall DBE Goal**

WSDOT, and its subrecipients (through WSDOT's Highways and Local Programs Service Center and Public Transportation and Rail Division), will use a combination of race-neutral and race-conscious means to achieve its annual overall goal.

#### **A. Race-Neutral**

Pursuant to 49 CFR Part 26.51, WSDOT and its subrecipients will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. WSDOT has determined that race-neutral means will include:

1. Whenever a DBE receives a prime contract because it is the lowest responsible bidder, the resulting DBE participation was achieved through race-neutral means;
2. Whenever a DBE receives a subcontract on a project that does not have a contract goal, its participation was also achieved through race-neutral means; and
3. Whenever a prime awards a particular subcontract to a DBE, on projects that do not carry a contract goal, because the DBE has proved in the past that it does the best or quickest work, or because it submitted the lowest quote, the resulting DBE participation has, in fact, been achieved through race-neutral means.

The following describes WSDOT's methodology to arrive at a projection of race-neutral participation during the development of this plan.

WSDOT first determined the percentage of DBE program achievement, as reported to the Federal Highway Administration, over the five-year period preceding implementation of 49 CFR Part 26 (1994-1998). This figure (18 percent) represents our proven capacity. Secondly, we subtracted WSDOT's overall DBE goal percentage (which was 16 percent) for the same period. (Example:  $18\% - 16\% = 2\%$ .)

Next, WSDOT totaled participation on those contracts where we did not set goals (state and federal). (Example being used here is 10 percent). We also account for other factors that may contribute to additional race-neutral DBE participation, such as:

1. The possibility that a portion of the DBE participation achieved over the past years using contract goals could have been achieved through race-neutral measures;
2. The method to which DBE participation is counted under the new Part 26;
3. The new Personal Net Worth requirement; and
4. The increase in federal aid funds under TEA-21.

The base figure (2 percent from the example above) was then adjusted by the non-goal figure (10 percent in this case), as well as consideration of the other factors listed above. This determines the percentage of DBE participation we expect to achieve with race-neutral means. (In this case, 9 percent.)

By taking the overall goal (14 percent) and subtracting the race-neutral percentage (9 percent), results in our race-conscious percentage (5 percent).

If WSDOT finds that it is not achieving the projected DBE participation through race-neutral means, which would result in our not meeting our overall goal, WSDOT will apply the race-conscious means (contract goals).

**B. Race-Conscious**

Race conscious measures will be in the form of contract goals. Contract goals will be used so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of the overall goal that is not projected to be met through race-neutral means.

WSDOT's OEO, Consultant Services, Highways and Local Programs Service Center, and Public Transportation and Rail Division will establish contract goals only on those USDOT-assisted contracts that have subcontracting possibilities. Contract goals will be determined using WSDOT's contract goal methodology (the size of the goals will be adapted to the circumstances of each contract, e.g., type and location of work, availability of DBEs to perform the particular type of work, etc.). Contract goals contract need not be established on every contract having subcontracting possibilities and will be expressed as a percentage of the total amount of a USDOT-assisted contract.

WSDOT will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual DBE participation by race-neutral means per 49 CFR 26.51(f). That is, if actual race-neutral participation exceeds projected race-neutral participation, WSDOT will reduce its use of race-conscious means. Conversely, if actual race-neutral participation falls short of projected race-neutral participation, WSDOT will increase its usage of race-conscious means — however, only as necessary to achieve its overall goal.

Race-neutral and race-conscious participation will be monitored and reported separately.

## **XXIV. Contractors' Good Faith Efforts**

The following are required Good Faith Efforts procedures for contract goals pursuant to 49 CFR Part 26.53:

### **A. Selection of Successful Bidder**

1. The successful bidder shall be selected on the basis of having submitted the lowest responsive bid and, in order to be responsive, making good faith efforts to meet the DBE goal. The bidder can meet this requirement in either two ways:
  - a. The bidder can meet the established DBE goal, documenting commitments for participation by DBE firms sufficient for this purpose; or
  - b. If the bidder does not meet the established DBE goal, the bidder can document its adequate good faith efforts.

This means that the bidder must show that it took all necessary and reasonable steps to achieve the DBE goal, and by their scope, intensity, and appropriateness to the objective, the bidder could reasonably be expected to obtain sufficient DBE participation, even if the bidder were not fully successful in meeting the established DBE goal. Mere pro forma efforts are not considered "good faith efforts" to meet the DBE contract requirements.

2. Should the low and otherwise responsive bidder fail to attain the goal and provide adequate good faith effort documentation in the bid submittal, its bid may be rejected and the next low responsive bid accepted.

Each bidder shall submit a written assurance with their bid that they will meet the goal. The successful responsive bidder must provide the following information at the time of bid submittal:

1. The names of the DBE subcontractors proposed for contracts, including the OMWBE certification number.
2. The dollar value of each DBE subcontract proposed.

The successful bidder will obtain verification of OMWBE certification from the DBE business firm. The certification will identify the firm as being eligible for DBE status. The successful bidder will have the responsibility of verification with OMWBE that the DBE firm's certification is current.

### **B. After Execution**

WSDOT will request that the apparent low bidder submit a description of the specific items of the work each DBE subcontractor will perform. This description, dollar amount, and name of the DBE firm is identified in the award letter and made Condition of the Award (COA) of the contract.

In the event a bidder is unable to meet the assigned DBE contract goal, the bidder shall provide additional information regarding its good faith efforts to do so per the requirements of the contract. Good Faith Effort (GFE) documentation may be required after award and during the execution of the contract. GFE documentation may also be required during substitutions when a firm is unable or unwilling to perform. The bidder must document the steps taken to obtain participation which demonstrate *good faith efforts*, as outlined:

1. Evidence the bidders attended any pre-solicitation or pre-bid meetings that were scheduled by WSDOT to inform DBEs of contracting and subcontracting or material supply opportunities available on the project;
2. Evidence the bidder identified and selected specific economically feasible units of the project to be performed by DBEs in order to increase the likelihood of participation by DBEs;
3. Evidence the bidder advertised in general circulation, trade association minority and trade oriented, women-focus publications, concerning the subcontracting or supply opportunities;
4. Evidence the bidder provided written notice to a reasonable number of specific DBEs, identified from the OMWBE Directory of Certified Firms for the selected subcontracting of material supply work, in sufficient time to allow the enterprises to participate effectively;
5. Evidence the bidder followed up initial solicitations of interest by contacting the DBEs to determine with certainty whether they were interested. This may include the information outlined below:
  - a. The names, addresses, and telephone numbers of DBEs who were contacted, the dates of initial contact, and whether initial solicitations of interest were followed up by contacting the DBEs to determine with certainty whether the DBEs were interested;
  - b. A description of the information provided to the DBEs regarding the plans, specifications, and estimated quantities for portions of the work to be performed;
  - c. Documentation of each DBE contacted but rejected and the reason(s) for that rejection;

6. Evidence that the bidder provided interested DBEs with adequate information about the plans, specifications, and requirements for the selected subcontracting or material supply work;
7. Evidence the bidder negotiated in good faith with the DBE firms, and did not without justifiable reason reject as unsatisfactory bids prepared by any DBE;
8. Evidence the bidder advised and made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by WSDOT or the contractor;
9. Evidence the bidders efforts to obtain DBE participation were reasonably expected to produce a level of participation sufficient to meet the goal or requirements of WSDOT;
10. Evidence that the bidder used the services of minority community organizations, minority contractor groups, local, state, and federal minority business assistance offices and other organizations identified by WSDOT and advocates for disadvantaged, minority, and women businesses that provide assistance in the recruitment and placement of disadvantaged, minority, and women business enterprises; and
11. Evidence the bidder used the services of WSDOT's DBE Supportive Services consultant.

C. Administrative Reconsideration

If WSDOT or its subrecipients determine that the apparent successful bidder/offeror has failed to make a good faith effort to meet the goal, WSDOT and its subrecipients will, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

1. As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so;
2. WSDOT's decision on reconsideration shall be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so;
3. The bidder/offeror shall have the opportunity to meet in person with said official to discuss the issue of whether it met the goal or made good faith efforts to do so;
4. WSDOT shall send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so; and
5. The results of the reconsideration process is not administratively appealable to the USDOT.



## XXV. Counting DBE Participation Toward Goals

- A. When a DBE participates in a contract, WSDOT and its subrecipients will:
1. Count **only** the value of the work actually performed by the DBE toward DBE goals;
  2. Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph 3 of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except those purchased or leased from the prime contractor or its affiliate);
  3. Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract toward DBE goals, provided WSDOT determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services; and
  4. Count the work a DBE subcontracts to another firm only if it is performed by another DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- B. Additionally, credit will be given only when:
1. The DBE is certified by OMWBE prior to commitment;
  2. The DBE commitment was made prior to contract award; and
  3. A commercially useful function is performed.
- C. Credit shall be deducted from meeting the contract, and overall goal where:
1. It is determined the DBE failed to perform a commercially useful function; and
  2. Where the DBE has been decertified.
- D. Credit Percentages

Credit toward meeting the contract goal varies with the type of DBE firm as follows:

1. **DBE Prime Contractors:** that supply labor and materials to perform a distinct element of the work - 100 percent credit applied only to **the portion of work** performed by the DBE prime.
2. **DBE Manufacturers:** that operate or maintain a factory or establishment that produces on the premises the materials or supplies obtained by the contractor — 100 percent credit.
3. **DBE Equipment Rental Firms:** the equipment must be owned by and registered to the DBE — 100 percent credit.

4. **DBE Regular Dealers/Suppliers:** firms that own, operate, or maintain a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business — 60 percent credit.
5. **Brokers, Packagers, Ad Hoc Suppliers, Manufacturers Representatives:** no credit for materials, transportation, or other cost — Net Fee credit.
6. **Joint Venture:** a contractor may count toward its DBE goal **only** that portion of work actually performed by the DBE joint venture partner(s) and/or its DBE subcontractors utilizing their own forces.

E. Counting DBE Items of Work on an Approved Joint Venture

A Joint Venture which involves a DBE as a minority partner must submit for approval a Joint Venture Agreement Schedule B (Information for Determining Joint Venture Eligibility) in order to count the DBE's participation on the contract. This form is attached to the Joint Venture Agreement (see Appendix 5). WSDOT/ECRB has the responsibility for approval of Joint Venture Agreements. WSDOT's Highways and Local Programs Service Center has responsibility for approval of Joint Venture Agreements involving subrecipients.

The process employed by WSDOT in approving DBE/JVs is as follows:

1. Determine the accuracy of the submittal.
2. Confirm that the DBE partner is certified and that the specific items of work proposed are within the area of the firm's SIC codes.
3. Review the certification documents to determine the last on-site visit. Determine if sufficient changes in the size, type of work, equipment acquisition, or supervisory staffing warrants an on-site visit.
4. Review with the WSDOT Contract Administration Office the prequalification documents submitted, to ascertain the sufficiency of the management and financial capabilities of the DBE partner.
5. OEO, in conjunction with the WSDOT Contract Administration Office, examines the work history, equipment, and key personnel of the DBE partner.

If the partners of the Joint Venture are determined to be the apparent low bidder on the project, the specific bid items and dollar amounts for the work to be performed by the DBE partner will be provided prior to the award of the contract. The DBE partner shall perform the distinct elements of the work described with its own work force, equipment, and supervision, to receive credit toward the DBE goal. The non-DBE contractor shall not exercise direct supervision, management, or control over the elements of the work assigned to the DBE partner. Any practice, arrangement, or condition that erodes the independence or inhibits the DBE firm in the performance of a Commercially Useful Function on its elements of the work shall result in the loss of credit toward the contract goal.



The State Construction Engineer's office (Highways and Local Programs Service Center for subrecipients) and OEO are responsible for the approval of joint ventures involving DBEs on WSDOT contracts.

An approval letter shall contain the following language:

*If you are the apparent low bidder, you will be required to provide specific bid items and dollar amounts for the work performed by the (name of the DBE/JV) prior to execution of the contract. (name of the DBE/JV) shall be held responsible to perform the distinct elements of the work therein described, with its own work force, equipment and supervision to be credited toward the DBE contract goal. Further, (name of non-DBE/JV) shall not exercise direct supervision, management or control over the elements of the work assigned to (name of DBE/JV). Any practice, arrangement or condition that erodes the independence of (name of DBE/JV) or inhibits the firm in the performance of a Commercially Useful Function, on its elements of the work shall result in the loss of credit toward the DBE contract goal.*

The General Special Contract Provisions contain the full text of the Joint Venture authority under 49 CFR 26.55, and is included in all federally assisted project contracts.



## **XXVI. Counting DBE Participation Toward Meeting Overall Goals of Subrecipients**

### **A. Subrecipients Who Have Adopted the WSDOT DBE Plan**

Credit shall be authorized or deducted per the requirements of (see XXV, Counting DBE Participation Towards Goals) above regardless of whether or not WSDOT or the subrecipient is the contracting agency.

### **B. Subrecipients Who Have Developed and Adopted Their Own WSDOT Approved DBE Plans**

Subrecipients falling into this category shall be required to submit quarterly reports to WSDOT demonstrating their goal attainment to date in a manner consistent with the requirements of 49 CFR Part 26. Subrecipients shall authorize or deduct credit for work performed by DBEs per the requirements of this plan regardless of whether they or WSDOT is the contracting agency. WSDOT shall include, in its quarterly report to USDOT, the status of subrecipient goal activities.



## **XXVII. DBE Management**

The DBE majority owner(s) must manage the work for which it has contracted. The management of the work shall include but is not limited to scheduling work operations, ordering equipment and materials (if the materials are a part of the contract), preparing and submitting certified payrolls and all required reports and forms, and hiring and firing of employees, including supervisory positions.

The DBE must supervise the daily operations of the work assigned by the contract. The DBE owner may act as superintendent and directly supervise his/her employees or a skilled and knowledgeable superintendent/foreman employed by and paid by the DBE must directly supervise the DBE's employees.

### **A. DBE Work Force**

The DBE must solicit, hire, place on its certified payroll, and control all workers performing work under its contract. The DBE owner or its superintendent must, on a full-time basis, supervise and control the work of the contract.

The DBE may, with prior written consent of the engineer and concurrence from OEO, augment its work force with personnel of another firm. The engineer shall approve the request only when:

1. Specialized skills are required.
2. The use of such personnel is for a limited time period.
3. Augmentation in the DBEs work force must not be repetitive or continuous.

### **B. DBE Equipment**

The DBE is expected to perform the work with equipment that is owned, being purchased, or leased by the DBE under a written lease agreement that has been approved by the project manager prior to the DBE starting work.

No credit will be given nor payment made for the cost of equipment leased or rented and used in the DBE's work when payment for those costs is made by a deduction from the prime contractor's payment(s) to the DBE firm.

The DBE must hire, direct, supervise, control, and carry on its payroll the operator of the equipment.

### **C. Equipment Leased From the Prime Contractor**

1. The DBE may lease equipment from the prime contractor provided a written rental agreement, separate from the subcontract and specifying the terms of the lease arrangement, is approved by the project manager and OEO prior to the DBE starting work. The lease arrangement must not be continuous/ repetitive or affect the DBE's adequacy of resources to do the work in its field of operation.

2. The DBE may lease specialized equipment and operators from the prime contractor provided a written rental agreement, separate from the subcontract contract and specifying the terms of the lease arrangement, is consented to by the Project Engineer and approved by OEO prior to the DBE starting work.

The Project Engineer shall consent to the lease agreement only when:

1. The equipment is of a specialized nature;
2. The equipment is readily available at the job site;
3. The operation of the equipment is under the full control of the DBE;
4. The lease arrangement is for a short term; and
5. The lease arrangement is a normal industry practice.

D. DBE Trucking Firms

1. DBE trucking firms must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting the DBE goals.
2. The DBE must itself own and operate at least one fully licensed, insured, and operational truck that is used on the contract.
3. Credit towards project goals for DBE trucking firms who do not own at least one truck will be granted only for the fees the DBE firm retains for providing the hauling service.

In order for DBE project goals to be credited, DBE trucking firms must be covered by a subcontract or a written agreement approved by WSDOT prior to performing their portion of the work.

In order to perform a CUF, the DBE trucking firm is restricted to the same subcontracting limitation in effect for other contractors. Based on standard subcontracting limitations, the DBE trucking firm shall be required to perform at least fifty percent (50 percent) of the work with his/her own trucks and personnel.

E. DBE Trucking Firms Use of Owner/Operator Trucks

DBE trucking firms may utilize owner/operator trucks. The number of owner/operator trucks may not exceed any limitations on subletting or reassigning the work specified. All owner/operators must appear on the DBE contractor's or DBE subcontractor's payroll designated as owner/operators. The hours worked or wages paid may be reflected either on the payroll or on the record of payments to each owner/operator.

F. DBE Trucking Firms Lease/Rental Agreements

DBE trucking firms may lease or rent trucks from other sources, except from prime contractors to whom they are subcontractors, provided:

1. A written valid lease/rental agreement on all trucks leased or rented is submitted to the project manager prior to the beginning of work;
2. Only the vehicle (not the operator) is leased or rented;
3. Agreement must include the lessors name, trucks to be leased, and agreed upon amount or method of payment (hour, ton or load hauled); and
4. All lease agreements shall be long-term agreements, not project by project.

The DBE is limited to leasing or renting two (2) additional trucks for each truck owned by the DBE trucking firm.

G. A DBE manufacturer is considered to be performing a Commercially Useful Function (49 CFR 26.55), when all of the following elements are present:

1. The firm operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
2. The DBE manufacturing firm must have received an “on-site” review and be approved by WSDOT-OEO to operate as a DBE Manufacturing firm prior to performing work on any USDOT federally-assisted contract. To schedule a review, the manufacturing firm must submit a written request to WSDOT/OEO and may not receive credit towards DBE participation until the completion of the review. Use of a DBE manufacturer that has not received an on-site review and approval by WSDOT-OEO prior to bid opening will result in the bid being declared nonresponsive (unless the contribution of the DBE manufacturer was not necessary to meet the project goal).

Once a firm’s manufacturing process has been approved in writing, it is not necessary to resubmit the firm for approval unless the manufacturing process has substantially changed.

Counting of the DBE may be allowed as a regular dealer, if approved as a service provider as described below.

Information on approved manufacturers (per contract) may be obtained from WSDOT-OEO. Notification of this provision shall be included in all federally-assisted contract bid documents.

H. A DBE Regular Dealer is considered to be performing a Commercially Useful Function (49 CFR 26.55), when all of the following are adhered to:

1. The firm owns, operates, or maintains a store, warehouse, or other establishment in which materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
2. To be a regular dealer, the firm must be an established, regular business that engages, as its principle business and under its own name, in the purchase and sale or lease of the products in question.

3. A person may be a regular dealer in such bulk items as steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealer's own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
4. Packagers, brokers, manufacturer's representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this program. If the distribution equipment is rented or leased, it must be on a long-term, ongoing basis. All firms are required to own or operate distribution equipment (even when it elects to keep recognized bulk products in stock).
5. Regular dealer status is granted on a contract by contract basis. To obtain regular dealer status, a formal written request must be made by the interested supplier (potential regular dealer) to WSDOT/OEO. OEO must be in receipt of this request at least seven (7) calendar days prior to bid opening. Included in the request shall be a full description of the project, type of business operated by the DBE, and the manner the DBE will operate as a regular dealer on the specific contract. Rules applicable to regular dealer status are contained in 49 CFR Part 26.55.
6. Once the request is reviewed by WSDOT-OEO, the DBE supplier requesting it will be notified in writing whether regular dealer status was approved. DBE firms that are approved as regular dealers for a contract (whenever possible) will be listed on the WSDOT Internet Homepage at: [www.wsdot.wa.gov/fossc/cons/contaa/](http://www.wsdot.wa.gov/fossc/cons/contaa/) prior to the time of bid opening. In addition, bidders may request confirmation of the DBE suppliers approval to operate as a regular dealer on a specific contract by writing the Office of Equal Opportunity, Washington State Department of Transportation, P.O. Box 47314, Olympia, WA 98504-7314 or by phone at (360) 705-7085.
7. Use of a supplier that has not received approval as a regular dealer prior to bid opening will result in the bid being declared nonresponsive (unless the contribution of the regular dealer was not necessary to meet the project goal).
8. In keeping with criteria set forth in federal regulations, an onsite review of all new or existing DBE supply firms requesting regular dealer status must be conducted prior to OEOs approving the firm as a regular dealer. All Certified DBE supply firms who have not requested a regular dealer on-site review and intend to operate as a regular dealer are strongly encouraged to do so.



- I. A DBE Service Provider is considered to be performing a Commercially Useful Function (49 CFR 26.55) when all of the following are adhered to:

The work or service provided by the DBE must be clearly identifiable with the contract items of work and not simply a service as part of the contractors general business overhead, such as supplying oil and fuel and other services required by the prime contractor as part of the contractors day-to-day personnel and equipment operation. Where DBEs act as brokers, distributors, and/or vendors in providing assistance in the procurement of facilities, materials, and supplies required for the performance of the contract, the dollar amount counted towards the contract goal is generally limited to the amount which actually represents the DBEs fee retained for the services provided. No credit towards the goal is allowed for money passed onto the manufacturers, suppliers, or other firms for the cost of the materials or supplies used.

1. The designation of DBE Manufacturer or Regular Dealer is not to be construed as an additional certification, but a designation that requires prior approval from the contracting agency. Failure to obtain approval from the contracting agency prior to submission of a bid shall be considered as evidence that the proposal is nonresponsive to the invitation to bid.
2. WSDOT will allow counting toward the contract DBE goal only the participation of DBEs which perform a commercially useful function pursuant to the rules, regulations, and guidelines as defined in this plan and in 49 CFR Part 26.
3. When it is determined or presumed that a DBE is not or would not be able to perform a CUF and the services offered by the DBE are therefore deemed not creditable toward contract goals, the DBE may present evidence to WSDOT to rebut that presumption.
4. WSDOT's decision on the rebuttal is subject to review by the Secretary of Transportation. During the period pending the decision on such rebuttal, the department's determination regarding non eligibility for contract goal credit remains valid, and the filing of the rebuttal shall in no manner serve to delay the letting or award of any contract.



## **XXVIII. Design-Build Contracting**

Design-Build or “Turnkey” contracting means; hiring a team to both design and construct, in lieu of the standard and proven practice of keeping the design process separate from construction contracting (Design-Bid-Build). One major difference is that Design-Build selection is based on several factors including qualifications, innovation, schedule, and price. In standard Design-Bid-Build contracting, selection of a Design firm is based on qualifications, and selection of a construction firm is based strictly on low bid. With the ideal Design-Build project, initial design takes place, designers obtain feedback from their building partner, design proceeds further, construction begins, feedback continues, design is completed, and then construction is completed.

The Washington State Legislature has authorized a test of Design-Build for transportation facilities in the 1998 Legislative Session (SSB 6439). Design-Build is seen as one possible delivery method available to WSDOT and is not intended to replace the standard Design-Bid-Build method that is so successful for most projects.

### **A. Procedures**

1. WSDOT will set an overall goal for the project prior to award. Responsiveness to the DBE goal shall not be determined prior to award.
2. The Design-Builder will (after award) submit to WSDOT a DBE Utilization Certification-DOT Form 272-056, identifying each subcontractor the Design-Builder will use to meet the overall goal (see Appendix 4).
3. The Design-Builder shall include in their proposal a DBE Performance Plan which must address how the Design-Builder plans to meet its DBE obligations.

### **B. DBE Contract Compliance**

1. WSDOT will notify the successful Proposer of the award of the contract in writing and include a request for a schedule for DBE participation during performance of the contract.
2. The schedule of DBE participation for design related work shall be submitted by the Design-Builder at the Pre-Contract Meeting as described in the Scope of Work Section 1027 of the Proposal.
3. The schedule of DBE participation for construction related work shall be submitted by the Design-Builder at the Pre-Construction Conference as described in the Scope of Work Section 1080 of the Proposal.
4. Work committed to DBEs by the Design-Builder must be performed by the designated DBE or a WSDOT-approved substitute (see XVI.F, Substitutions). DBE contract work items shall not be performed by the Design-Builder in lieu of subcontracting, without approval of WSDOT.
5. Only DBEs that perform a Commercially Useful Function in the work of a contract will be counted toward the DBE goal (see XVI.D, Commercially Useful Function).

6. WSDOT and the Design-Builder recognize that the actual quantities of work may vary substantially from what is now anticipated because the design has not been completed. It is the Design-Builder's duty to assure that the goal will be met if the Design-Builder has committed to meeting the goal.
7. In the event work committed to a DBE does not materialize as anticipated, the proposer will commit to increasing the work to committed DBEs or add additional DBEs, as needed, to meet the contract goal.
8. WSDOT reserves the right to inspect all records of the Design-Builder and all records of the DBEs, concerning this contract.
9. The Design-Builder shall provide the project engineer copies of the completed and signed agreements with the DBEs. These agreements must be submitted prior to the DBE beginning work.
10. Regular Dealers on Design-Build projects need not request approval from WSDOT prior to award, But must request approval in writing prior to participation on the project.
11. The Design-Builder will provide WSDOT a certified invoice showing amounts paid to DBEs. No credit will be given until the DBEs have received payment (including retainage).

C. DBE Participation as a Design-Builder

1. A DBE may participate as a prime Design-Builder, subcontractor, joint venture with either a prime Design-Builder or a subcontractor, or as a vendor of materials or supplies;
2. A DBE joint venture shall be responsible for a clearly defined portion of the work to be performed, in addition to meeting the requirements for ownership and control;
3. The Design-Builder shall, as a minimum, seek DBEs in the same geographic area in which it generally seeks subcontractors for a given project. If the design-builder cannot meet the goals using DBEs from this geographic area, the Design-Builder, as part of its effort to meet the goals, shall expand its search to a reasonably wider geographic area.

D. Nonperformance by a DBE With a Design-Builder

1. In the event that a DBE is unable or unwilling to fulfill its agreement with the Design-Builder, the Design-Builder will immediately notify the project engineer and provide all facts surrounding the matter;
2. Such failure on the part of a DBE will not relieve the Design-Builder of responsibility for meeting reasonable good faith efforts to obtain another certified DBE to perform an equal or greater dollar value of work; and
3. Failure of the Design-Builder to meet established DBE goals may affect future pre-qualification with WSDOT and/or its subrecipients.

## **XXIX. DBE Eligibility Certification**

### **WSDOT's Unified Certification Program**

Certification for the WSDOT DBE Program has been delegated to OMWBE through an Interagency Agreement with WSDOT (see Appendix 6). However, WSDOT retains responsibility for assuring certification of DBEs are performed consistent with 49 CFR Part 26 regulations. When and/or where state law conflicts with federal regulation, federal regulations will prevail.

The Office of Minority and Women's Business Enterprises (OMWBE) is the sole authority in the state of Washington to perform certification of all minority business enterprises, women business enterprises, and socially and economically disadvantaged business enterprise programs administered by any state, local, or federal agency throughout the state of Washington. This statutory authorization extends to and binds all U.S. Department of Transportation DBE program recipients in the state of Washington.

OMWBE provides staff to conduct DBE certification, recertification, decertification, appeals, challenges, investigations of third party allegations, and public awareness activities pertaining to certification programs. Legal counsel is provided by the Washington State Office of the Attorney General.

In deciding what constitutes activities related to highway construction or activities in support thereof, OMWBE will use as guidance the Interagency Agreement between WSDOT and OMWBE and the *Standard Industrial Classification Manual*\* published by the Executive Office of the President, Office of Management and Budget. The intent of this agreement as stated in this paragraph is to ensure that those applicant firms who are most likely to engage in federal aid highway work receive on-site reviews.

\*OMWBE shall implement the North American Industrial Classification System (NAICS) upon completion of its development by U.S. Department of Commerce. Thereafter, all references in this plan to the Standard Industrial Classification (SIC) Code System shall be deemed to refer to the appropriate section of NAICS.

OMWBE's Certification Eligibility Procedures and Application forms are attached (see Appendix 7).

#### **A. Purpose of Certification**

The purpose of certification is to ensure only small businesses independently owned and controlled in both substance and form by one or more socially and economically disadvantaged persons as defined by 49 CFR Part 26, Subparts D and E participate in the departments DBE Program. Except as provided in 49 CFR Part 26.73(e) and (h), a firm that is not owned by such individuals, but instead is owned by another firm, even a DBE, cannot be an eligible DBE. These businesses must meet all the standards and eligibility as set forth in 49 CFR Part 26 and are operated under the guidelines established by the USDOT.

## B. OMWBE Certification Process

The certification process consists of:

1. A written certification application containing information regarding eligibility and instructions on completing and furnishing the necessary information and documentation of business size, ownership, and control required of a business wishing to participate in the program, and a notarized Statement of Social and Economic Disadvantage and Statement of Personal Net Worth (DBE Application - Supplement 1).
2. The certification application and supplement #1, must be submitted by all businesses initially seeking recognition as a DBE and any business previously certified that has not been recertified. The recertification application and Supplement #1, must be submitted by currently certified firms seeking recertification. Firms which have previously been certified, but allowed their certification status to lapse due to failure to return the recertification application within 30 days, will be allowed to submit a recertification application and Supplement #1 if submitted within 90 days of their file being administratively removed. A firm is removed due to lack of action by the affected firm, and is ineligible to participate (be counted toward DBE goal attainment) as a certified DBE, until it complies with OMWBE's recertification requirements.
3. The applicant has the burden to establish eligibility by a preponderance of the evidence on the basis of present circumstances. OMWBE shall make an eligibility determination by considering all the facts in the record, viewed as a whole. A firm may not be denied certification solely on historical information indicating lack of eligibility, if the firm currently meets all eligibility requirements. New applications for certification are examined and evaluated to determine if the business meets all of the following criteria. The firm:
  - a. Is a small business as defined in Section 3 of the Small Business Act and 49 CFR Part 26, Subpart D and E, Subsection 26.65 as appropriate;
  - b. Is at least 51 percent owned and controlled by one or more socially and economically disadvantaged individuals as defined by 49 CFR Part 26, Subsection 26.69 and Appendix E, or a tribally owned concern;
  - c. Is an operational and functional business; and
  - d. Has adequate resources with which to perform the work of the contract.

Additionally, OMWBE shall determine whether the personal net worth of each owner on whom DBE eligibility is based, does not exceed \$750,000. OMWBE shall make this determination based upon the information contained in the Supplement #1 to the DBE application or recertification application, together with documentation submitted by the applicant to verify his or her personal net worth. As it relates to Supplement #1, all information contained therein and all documentation submitted with the Supplement shall be kept confidential, unless the individual to whom the information applies consents in writing to the release of the information to a third party.

4. Guidelines for use in making certification determinations are included in 49 CFR Part 26, "Individual Determinations of Social and Economic Disadvantage."
5. OMWBE reviews each applicant's file and determines if the business is to be approved or denied. OMWBE may request additional information before making its determination. If approved, the business will be added to OMWBE's listing of certified businesses. If certification is denied, OMWBE will document the reasons for denial. Each applicant is notified in writing of OMWBE's decision.
6. All DBE firms will be recertified no sooner than once every three years. The DBE firm's file shall contain:
  - a. A written recertification application to accomplish the renewal of the DBE's certification every three years;
  - b. Supplement #1 — Economic and Social Disadvantaged and Personal Net Worth Statements; and
  - c. A recertification letter.
7. OMWBE initiates the recertification process by notifying the business and providing appropriate forms and instructions prior to the expiration date. OMWBE performs the same review in recertification as in the initial certification.
8. Should a business fail to return the recertification application and/or Supplement #1 prior to the expiration date of its certification, the business will be removed from OMWBE's listing of certified firms. To ensure uninterrupted certification, OMWBE shall notify the currently certified DBE firm in writing at least 30 days prior to the expiration date of its certification, that the certification will be expiring. If no response is received from the DBE firm in the time frame indicated, written notice of intent to administratively remove the firm from the listing is provided. If no response is received, the firm is administratively removed due to lack of action by the affected firm, and the firm is ineligible to participate as a certified DBE until it complies with OMWBE's requirements.
9. Notwithstanding the recertification review process, each DBE, on its anniversary date (except in the year the DBE is renewed for recertification), must submit a "No Change" affidavit or declaration, together with supporting documentation on the firm's size and gross receipts, specifically stating there have been no changes in the firm's circumstances affecting its ability to meet the certification eligibility criteria (except for changes identified in any "Notice of Change"), including, without limitation, the SBA business size criteria and the overall gross receipts cap of 49 CFR Part 26. A DBE must also submit supporting documentation concerning its size and gross receipts with the affidavit.

10. OMWBE charges a \$20.00 nonrefundable processing fee for all new applications and recertification applications. However, the fee may be waived upon the applicant's written request showing that it creates an undue burden.

C. Verification of Eligibility

1. It is the responsibility of the certification applicant to submit the required information in a notarized statement or declaration signed under penalty of perjury. It is OMWBE's responsibility to certify the applicant who meets all the eligibility standards of 49 CFR Part 26. OMWBE shall process an application for certification within ninety (90) days after receipt of all required information from the applicant. OMWBE shall notify the applicant in writing when it has received all required information in order to establish the commencement of the 90-day review period. However, this period may be extended once for a period of no more than an additional sixty (60) days upon written notice to the applicant, explaining fully and specifically the reasons for the extension.

If OMWBE fails to process an application within this time period or the extended time period, it shall be considered constructive denial of the application and the applicant may file an appeal to the U.S. Department of Transportation (USDOT) as indicated in 49 CFR Part 26.89.

2. In determining whether an applicant is an eligible disadvantaged business enterprise, a certification review will be performed. At a minimum, the certification review will include a desk document review of the certification application and all attachments, an on-site visit to the offices of the business, and if appropriate, a visit to the job site(s) on which the business is working, if any, at the time of the eligibility investigation.
3. Businesses whose domicile is in a state other than Washington are required to have a certification determination by their home state prior to applying in Washington. OMWBE may contact the appropriate transportation/highway agency of any other state where the business is known to have been certified. Information obtained from another state may be considered by OMWBE in acting upon applications.

D. Guidelines for Certification

1. Business Status

OMWBE will first determine if the business is in existence, operational, functional, and for profit. A business that is in the early stages of organization and is not yet set up to do business does not qualify as a DBE under 49 CFR Part 26, and no further determinations need be made.

The business must provide more than pro forma evidence that it exist and was not organized merely in an attempt to take advantage of project goals.

The disadvantaged owner(s) must possess the expertise and the business must possess the resources to operate in the business's field of work.



## 2. Business Size

OMWBE must determine whether an applicant is a small business concern as defined in Section 3 of the Small Business Act. If the applicant does not meet the small business standards, then it is not eligible to participate as a DBE under 49 CFR Part 26, and no further determination need be made.

In determining whether a business is small, the standards established by the Small Business Administration in 13 CFR Part 121 will be applied. Currently, the following business size standards apply:

- a. Contractors whose primary activity is classified in Standard Industrial Classification (SIC) code groups 1500 and 1600: Average annual gross receipts for the three preceding fiscal years cannot exceed \$16.6 million dollars.
- b. Specialty trade contractors whose primary activity is classified in SIC code group 1700: Average annual gross receipts for the preceding three fiscal years cannot exceed \$7 million dollars.
- c. Engineering, architectural, surveying services: Average annual gross receipts for the preceding three fiscal years cannot exceed \$4.0 million dollars.
- d. Suppliers of manufactured goods: The business, including its affiliates, does not have more than 500 employees, provided the average annual gross receipts does not exceed \$16.6 million dollars.

OMWBE shall conduct the same eligibility review of applicants found to be disadvantaged by the Small Business Administration (SBA) pursuant to Section 8(a) of the Small Business Act as it does of all other applicants.

Evidence which may be reviewed to determine business size includes financial statements and federal income tax returns for the most recent three years of operation as well as information regarding the business owners, managers, and key employees; location and ownership of facilities; source and size of work force and equipment; and the extent to which the business relies on other companies for services.

## 3. Family Run Businesses and Franchises

Family run businesses are not automatically ineligible. The disadvantaged owners must demonstrate they meet all of the eligibility standards under 49 CFR Part 26. However, the following situation could suggest the firm would be ineligible to participate:

*When the nondisadvantaged family member shares with the disadvantaged owner the management and control responsibilities and the nondisadvantaged family member possesses experience in the firm's field of operations superior to the disadvantaged owners.*

A franchise may be certified if it meets the eligibility criteria set forth in 49 CFR Part 26 and the franchiser is not affiliated with the franchisee. For purposes of DBE eligibility, restraints relating to standardized quality, advertising, accounting format and other provisions imposed on the franchisee by the franchise agreement, will not be considered for the purpose of determining whether affiliations exist, provided the franchisee has the right to profit from its efforts and bears the risk of loss commensurate with its ownership interest. Alternatively, affiliation may be found to exist where the franchise agreement provides for common management or excessive restrictions of the sale or transfer of the franchise interest.

#### 4. Expertise

Where expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership interest, it must be:

- a. In a specialized field;
- b. Of outstanding quality;
- c. In areas critical to the firm's operation;
- d. Indispensable to the firm's potential success;
- e. Specific to the type of work the firm performs; and
- f. Documented in the business records of the firm.

Additionally, the individual whose expertise is relied upon must have a significant financial investment in the firm.

#### 5. Presumed Socially and Economically Disadvantaged Individuals

Members of the following designated groups are rebuttably presumed to be socially and economically disadvantaged individuals: women, Black-Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and other minorities found to be disadvantaged by the SBA. The definition of these groups is outlined in 49 CFR Part 26, Subsections 26.5 and 26.63. However, these individuals must submit a notarized certification that they are in fact socially and economically disadvantaged.

If OMWBE has reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, the individual must provide appropriate documentation establishing membership in a designated group. Examples of "appropriate documentation" include state or federal tribal enrollment, benefits, and/or entitlements based upon group membership, or sworn statements of third parties (who are recognized members of the designated group) which establish by a preponderance of the evidence that the individual has held him/herself out to be a member of the group over a long period of time prior to application for certification, and is regarded as a member of the group by the relevant community.

If OMWBE determines the individual claiming disadvantaged group membership is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis. Individuals who are not members of one of the designated presumptive groups may request OMWBE to make an individual determination of social and economic disadvantage.

OMWBE's determinations of disadvantaged group membership are subject to appeal according to the certification appeals procedure of 49 CFR Part 26.89.

Persons who are members of one of the designated groups, but whose personal net worth exceeds \$750,000 as shown on the PNW, shall not be presumed to be socially and economically disadvantaged. OMWBE is not required to conduct any proceeding to conclusively rebut the presumption of economic disadvantage before determining the individual is not disadvantaged. However, if the individual challenges OMWBE's determination, then OMWBE will conduct a proceeding pursuant to 49 CFR 26.87 to determine whether the disadvantaged status of the individual shall be removed.

6. Determinations of Nonpresumptive Individuals as Socially and Economically Disadvantaged

Socially disadvantaged persons are those who have been subject to racial or ethnic prejudice or cultural bias within American society, because the person's identity as a member of a group and without regard to the person's individual qualities which stems from circumstances beyond the person's control. Evidence of individual social disadvantage must include the following elements:

- a. At least one objective distinguishing feature that has contributed to social disadvantage; e.g., race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;
- b. Personal experiences of substantial and chronic disadvantage in American society, not in other countries; and
- c. Negative impact on entry into or advancement in the business world because of disadvantage. Any relevant evidence in assessing this element will be considered to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world. In every case, the following will be considered:
  - (1) Education. Denial of equal access to higher education institutions and vocation training, exclusion from social and professional association with students or teachers, denial of educational honors and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

- (2) Employment. Unequal treatment in hiring, promotions and other aspects of professional advancements, pay and fringe benefits and other terms and conditions of employment, retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into nonprofessional or nonbusiness fields.
- (3) Business History. Unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and businesses associates, and exclusion from business or professional organizations.

**Note:** While persons with disabilities are not a group presumed to be disadvantaged, OMWBE will carefully review individual showings of disadvantage by persons with disabilities and make a case-by-case determination whether such a person is socially and economically disadvantaged for purposes of 49 CFR Part 26.

Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

Each person claiming economic disadvantage must submit the following:

- a. Narrative describing the conditions which are the basis for the claim; and
- b. Personal financial information. Note: If married, the person must also submit a separate financial information for his/her spouse, unless they are legally separated.

## 7. Ownership and Control

Once business size and social and economic disadvantage status have been determined, ownership and control will be evaluated to ensure that the business applying for DBE certification is, in fact, independently owned and controlled by one or more socially and economically disadvantaged individuals.

- a. The ownership and control by minorities or women shall be real, substantial, and continual and shall go beyond the *pro forma* ownership of the firm as reflected in its ownership documents. The minority or women owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as a DBE. Absentee or titular ownership by DBE owners who do not take an active role in controlling the business is not consistent with the DBE eligibility standards.

- b. At least 51 percent of the ownership (or each class of the partnership interest, voting and aggregate of all stock) needs to be held by socially and economically disadvantaged individuals, based upon real and substantial contributions of expertise, capital, or other tangible personal assets, to show start-up contribution.
- c. Financing (i.e., loans) obtained from a disinterested party (e.g., lending institution) to acquire start-up contribution may be permissible. However, at the time of making application, the DBE owner's interest cannot be subject to any financing obtained from the former nondisadvantaged owner of the applicant firm.
- d. All interests in a business or other assets obtained by the disadvantaged individual as a result of a gift or transfer without adequate consideration from a nondisadvantaged individual or non-DBE firm who is involved in the firm seeking certification or affiliated with the firm, involved in the same or similar business activity as the firm seeking certification, or engaged in an ongoing business relationship with the firm or an affiliate of the firm seeking certification, shall be presumed to not be held by a socially and disadvantaged individual. To overcome this presumption, the applicant must present clear and convincing evidence that the gift or transfer was made for reasons other than obtaining DBE certification and the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a nondisadvantaged individual who provided the gift or transfer.
- e. The DBE owner(s) shall devote full time efforts to the firm. The determination of whether they are devoting their full time efforts shall be made on a case-by-case basis. A DBE owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevents the owner(s) from devoting sufficient time and attention to the affairs of the firm as required by 49 CFR Part 26.
- f. A business applying for DBE certification and operation in the SIC code as a trucking firm must own and operate at least one fully licensed and operational truck in order to be counted for all of the trucks it uses, including those leased from a DBE firm or leased from a DBE owner-operator. A DBE may lease from a non-DBE owner operator, but only the fees paid will be counted.
- g. An eligible DBE shall be an independent business. An independent business is one the viability of which does not depend upon its relationship with another firm or firms.
- h. Factors which are reviewed pursuant to 49 CFR Part 26, Subsection 26.71, include the business relationships with non-DBE firms in the areas of personnel, facilities, equipment, financial and/or bonding support, and other resources. OMWBE also examines present or recent employer/employee relationships between the disadvantaged owner and the

non-DBE firm or persons associated with non-DBE firms and the firm's relationships with prime contracts in order to determine whether a pattern of exclusive or primary dealings with the prime contractor exists which compromises the independence of the applicant.

- i. In determining control, OMWBE considers all facts in the record, as a whole, to determine whether the applicant has an overall understanding of management or has technical competence and experience directly related to the type of business in which the firm is engaged. (The firm will only be certified for the scope of work the DBE owner(s) controls.) The owner is not required to have experience or expertise in every critical area of the firm's operation, or greater experience or expertise in a given field than managers or key employees, but must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities, and to use this information to make independent decisions concerning the firm's daily operations, management and policy making. Expertise limited to office management administration or bookkeeping functions unrelated to the business's principle activity is insufficient if the minority person or female applicant is not knowledgeable in all aspects of the business and independently makes the basic decisions in daily operations. Also, the minority person or female must have experience and technical competence in the industry to which certification is sought.

#### 8. Commercially Useful Function

"Commercially useful function" is not a certification issue unless there is a pattern of conduct indicating a firm's involvement in attempts to evade the certification eligibility requirements.

#### E. Ineligibility Complaints

1. In accordance with 49 CFR 26.87, any third party may file a complaint alleging a currently certified firm is ineligible. The complaint must be in writing and specify the alleged reason(s) why the firm is ineligible. OMWBE will not accept anonymous complaints. The review will be conducted within 10 working days of OMWBE being notified of the questionable status. Such a review may consist of the following, as may be relevant to the complaint:
  - a. A desk document review of the certification file;
  - b. An on-site interview including interview of the business principals and others with knowledge of the company, including employees;
  - c. An inspection of the business's documents and records to verify or clarify information furnished regarding the applicant's certification as a disadvantaged business, its status, business size, operational and managerial control, and independence; or
  - d. An inspection of the physical plant of the business and job site activities.

A report will be completed and submitted by OMWBE to WSDOT within ten (10) working days of the completion date.

2. OMWBE shall keep the identity of the complainants confidential, at their election, unless to do so is contrary to state law and would hinder the investigation, proceedings or hearing, or result in a denial of appropriate administrative due process to other parties. In these instances, OMWBE shall advise complainants for the purpose of obtaining their waiver of the confidentiality privilege. OMWBE must also advise complainants that their failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing in some circumstances.

F. Appeals by Businesses Denied Certification

1. A business denied certification or recertification by OMWBE will be notified in writing of the determination. The determination shall explain the reasons for the denial and shall specifically reference the evidence in the record that supports each reason for denial as well as the regulatory authority relied upon. OMWBE shall make all documents and other information on which the denial is based available to the applicant upon its request.
2. A business denied certification may request OMWBE review its denial determination by requesting an informal show cause review in writing within 20 calendar days of the denial determination. OMWBE will consider any additional documentation and information the firm submits with its request for an informal show cause review. Upon conclusion of its review, OMWBE shall either affirm or reverse its original denial determination. OMWBE shall inform the business in writing of this decision, which is administratively final for purposes of appeal. If OMWBE affirms its original denial, it shall notify the business in writing of the appeal procedures available to the business. OMWBE will consider requests for hearings on denials of certification or recertification if the request is received during the stated time limit. A firm that is denied recertification may request a hearing of the denial to recertify. Hearings are not, however, mandatory when the initial denial of certification is determined by OMWBE.
3. A business denied certification may submit an administrative appeal to the USDOT.
4. A business that is denied certification may not submit more than two applications in one calendar year, provided however, that when a firm is denied certification, the firm may not reapply within six (6) months of the date the firm was previously denied.
5. Appeal of OMWBE decisions must be made directly to the USDOT. Appeals of OMWBE final decisions must be made within 180 days of the final administrative decision. Send appeals to the following address:

U.S. Department of Transportation  
Office of Civil Rights  
400 7th Street SW, Room 2401  
Washington, D.C. 20590

#### G. Removal of Eligibility

1. OMWBE shall remove DBE certification upon determining the business does not meet the eligibility criteria. However, before removal of certification, the business will be afforded due process which shall include an opportunity for an informal hearing to contest the proposed decision. The firm may elect to present information and argument in writing without having a hearing.
2. When new or additional information is gathered that indicates the business does not meet the eligibility requirements or the firm lacks independence and control of its business operations, OMWBE will notify the business of its intent to remove its eligibility for cause. The notice shall set forth the reasons for the proposed determination and specifically reference the evidence in the record on which each reason is based.
3. The request for an informal hearing must be in writing and must identify the specific areas in which the business feels the decision is in error. The written request must be received by the OMWBE within 20 calendar days of notification to the business of the proposed decision to remove its certification.
4. A firm's certification will be removed due to lack of action by the affected firm, and the firm is ineligible to participate as a certified DBE until it complies with OMWBE's recertification requirements. A business whose certification is administratively removed may submit a recertification application if submitted within 90 days of the certification being administratively removed.
5. The Certification Committee shall conduct the informal hearing, review the information presented and make a final determination. OMWBE shall make a verbatim record or establish another means that gives the appellant the opportunity to review the record of the initial proceeding of the informal hearing proceedings in detail. The purpose of the Certification Committee is to provide due process by conducting an impartial and disinterested review of OMWBE's initial proposed determination to remove eligibility. The Committee shall provide the firm the opportunity to be heard and respond in person, writing, and/or telephonic conference at the business's option, and present information/documentation in support of its argument that OMWBE's proposed determination should be reversed. The program specialist who made the proposed determination shall present the facts, reasons, and legal authority for OMWBE's proposed determination to the committee. The Committee may require the specialist to conduct such additional investigation and/or analysis as may be necessary for the Committee to conduct its review and make a final determination. Upon completion of its review of all responses, information, and documentation submitted, the Committee shall decide whether to affirm or reverse OMWBE's proposed determination. The Committee shall promptly notify the business in writing of its determination, which is administratively final. If the decision to remove eligibility is reaffirmed, the decision becomes effective immediately. The affected business will be given written notice of OMWBE's final decision to remove eligibility.



If a business does not submit a request for a review of OMWBE's determination by the stated deadline, the decision will stand and the business' eligibility shall remain removed.

The affected business will be given written notice of OMWBE's final decision. Such notice will advise the business of its right to appeal the decision to the USDOT pursuant to 49 CFR Part 26, Subsection 26.91.

Credit may be given for work performed to the firm appealing a decision until OMWBE's final determination of ineligibility.

#### H. Graduation

When OMWBE determines a DBE firm no longer meets the applicable definition of a small business concern, the DBE firm will be graduated. OMWBE shall accord the firm the same due process and appeal rights as may be available to a firm that no longer meets the DBE program certification eligibility criteria (see Removal of Eligibility).

#### I. Notice Given to Federal Authorities

The name and address of each business and its principal officials denied certification or whose eligibility is removed by OMWBE, along with the basis for such action will be provided to WSDOT who will then notify the appropriate federal offices within ten (10) days of the action.

#### J. Challenge of Socially and Economically Disadvantaged Status

Pursuant to 49 CFR Part 26, OMWBE is required to make the presumption that individuals who are members of groups specifically defined in 49 CFR Part 26, Subsection 26.5 are socially and economically disadvantaged. The presumption is rebuttable.

Any third party may file a complaint to challenge the status of any individual presumed to be socially and economically disadvantaged, when that individual is owner of a business certified by or seeking certification by OMWBE as a DBE.

The procedures for filing, processing, and resolving third party complaints of an individual's social and economic disadvantaged status are:

1. The complaint must be made in writing to OMWBE. Along with its letter, the complaining party must include all available information relevant to a determination of whether the responding party is in fact socially and economically disadvantaged.
2. OMWBE will determine, on the basis of the information provided by the complaining party, whether there is reason to believe that the individual is in fact not socially and economically disadvantaged. If OMWBE determines that there is no reason to believe that the individual is not socially and economically disadvantaged, OMWBE will so inform the complaining party in writing. This will terminate the proceeding.

3. If it is determined that there is reason to believe the individual is not socially and economically disadvantaged, OMWBE will notify the individual in writing that his/her status as a socially and economically disadvantaged individual has been questioned. The notice shall identify the complaining party and summarize the grounds for the complaint. The notice shall also require the responding party to provide to OMWBE within 20 calendar days, information sufficient to permit OMWBE to evaluate his/her status as a socially and economically disadvantaged individuals.
4. OMWBE will evaluate the information available to it and make a proposed determination of the social and economic disadvantage of the responding party. To further substantiate the information submitted, OMWBE may interview selected members of the minority and business community in the responding party's location. OMWBE will notify both parties of its proposed determination in writing, setting forth reasons for its proposal. OMWBE may provide an opportunity to the parties for an informal meeting, at which time they can respond to the proposed determination. It will be mandatory that the responding party appear in person.
5. Following the informal meeting, OMWBE will make a final determination and inform the parties of the decision in writing.
6. In making its determinations, OMWBE will use the social and economic disadvantage determination criteria set forth in Appendix E.
7. While a challenge is pending, the presumption that the challenged party is a socially and economically disadvantaged individual shall remain in effect.
8. The final determination by OMWBE under the section may be appealed by the adversely affected party to: U.S. Department of Transportation, Office of Civil Rights, 400 7th Street, S.W., Room 2401, Washington, D.C. 20590, within 180 days of OMWBE's final decision.
9. OMWBE will inform the adversely affected party of its final decision.

K. Duty to Cooperate

All participants in the Department's DBE program, including, but not limited to, DBE firms and applicants for DBE certification, complainants, and contractors using DBE firms are required to cooperate fully and promptly with OMWBE certification reviews, investigations and other requests for information. Failure to do so shall be grounds for denial or removal of certification, according to the particular status of the firm involved.

All DBEs must provide OMWBE with a “Notice of Change” affidavit within 30 days of any change in their circumstances affecting their ability to meet any of the certification eligibility criteria. The affidavit must describe the nature of the change(s) in detail. For purposes of this requirement, a “change” in the DBEs’ circumstances includes, without limitations, a change in the certification regulation that affects the firm’s eligibility. To ensure all DBEs are aware of this obligation, OMWBE shall include written notice of this obligation to each DBE in its certification and recertification letters.

L. Effect and Limits of OMWBE Certification

OMWBE certification of a business as a DBE attests only to the fact that every reasonable effort made by OMWBE revealed that the applicant met the criteria for designation as a DBE insofar as group membership, individual disadvantage, business size, ownership, and control. Certification by OMWBE in no manner suggests, implies, represents, or guarantees the actual or potential ability, dependability, or availability of the business to responsibly and satisfactorily commence and/or complete a particular contract.

Contractors and others contemplating subcontracts or other ventures with DBEs are expected to use the same degree and standards of screening and selection when negotiating with these businesses as customarily used in similar negotiations with others, requiring such evidence as financial and operating stability, past performance, current capability, availability etc., together with such assurance and guarantees as necessary.

M. Exclusion From Participation in Federally Assisted Programs Prohibited

Title VI of the Civil Rights Act of 1964, as amended, provides, in part, that no person in the United States shall, on the basis of race, color, sex, or national origin, be excluded from participation in any program or activity receiving federal financial assistance.

Nothing in 49 CFR Part 26, or in OMWBE’s certification process is intended to prevent any otherwise qualified individual, business, or joint venture from competing for and/or participating in any project, program, or activity. The only affect of the certification process is that any person, business, or joint venture wishing to participate as a DBE must be certified and that contractors, in fulfilling contract goals, can claim credit only for utilizing certified businesses. Businesses which choose not to apply for certification or businesses unable to fully meet the small business and prescribed ownership and control criteria, may nevertheless bid on and participate in department projects and activities but will not be recognized or given credit as DBEs in fulfillment of contract goals.



**XXX. Reporting to USDOT**

WSDOT will report participation to USDOT as follows:

- A. WSDOT will report DBE participation on a quarterly basis, using USDOT Form 4630. These reports will reflect payments actually made to DBEs on DOT assisted contracts; and
- B. WSDOT will annually submit USDOT Form 4630, as modified for use by FAA recipients.



### **XXXI. Confidentiality**

WSDOT and its subrecipients will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information consistent with federal, state, and local law (RCW4212.310). Notwithstanding any contrary provisions of state or local law, WSDOT will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than USDOT) without the written consent of the submitter.

Questions or comments concerning WSDOT's Disadvantaged Business Enterprise Program should be made to:

Manager, External Civil Rights Branch (ECRB)  
Washington State Department of Transportation  
Office of Equal Opportunity  
P.O. Box 47314  
Olympia, WA 98504  
(360) 705-7085

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